TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 21.

JOSEPHINE H. THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON HOLT, WILLIAM G. STERRETT, MARGARET BOWMER, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 11, 1899.

(16,930.)

(16,930.)

SUPREME COURT OF THE UNITED STATES.

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JOSEPHINE H. THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

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In the Court of Appeals of the District of Columbia

JOSEPHINE H. THROCKMORTON *et al.*, Appellants,
vs.
WASHINGTON D. HOLT *et al.*
} No. 712.

a Supreme Court of the District of Columbia.

In re Estate of JOSEPH HOLT, Deceased. At Law. No. 39648.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition of Washington D. Holt et al. for Letters of Administration.*

Filed August 17, 1894.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283.

To the honorable the justice of the supreme court of the District of Columbia, holding a special term of said court for orphans' court business:

The petition of Washington D. Holt, William G. Sterett, and John W. Holt respectfully represents—

1.

That they are citizens of the United States and residents, respectively, the said Washington D. Holt of the State of Kentucky, the said William G. Sterett of the District of Columbia, and the said John W. Holt, of Yazoo City, in the State of Mississippi.

2.

They further represent that Joseph Holt, a citizen of the United States and a resident of the city of Washington, District of Columbia, died on the 1st day of August, A. D. 1894, at his residence, in said city of Washington.

3.

That the said Joseph Holt left him surviving no widow or children or descendents of chiidren.

2 4.

That the said Joseph Holt had brothers and sisters as follows, to wit: Richard S. Holt, James J. Holt, Thomas Holt, Robert S. Holt, and Elizabeth Holt, who intermarried with William Sterett, the father of your petitioner William G. Sterett, all of whom [brothers and said sister]* died before the death of said decedent, Joseph Holt.

4.

That the said Richard S. Holt and James J. Holt died unmarried and without issue; that the said Thomas Holt left [no widow]* a widow, who has since died, him surviving ʌ and that your petitioner Washington D. Holt is his son and sole heir-at-law; that the said Robert Holt left him surviving (and who are still living) his widow, Ann Holt, and the following-named children, to wit, Sarah, John W., Lockie, Robert, Thomas, and James Holt, all of whom are of full age and non-residents of the District of Columbia, and that the said Robert had one son, who died leaving him surviving his son Joseph, who is a minor of the age of 15 years ʌ and his sole heir-at-law and resides at Sherman, in the State of Texas; that the said Elizabeth Sterett died leaving her surviving your petitioner William G. Sterett and her daughter [Elizabeth]* Margaret Bowmer, formerly Margaret Sterett, as her sole heirs-at-law, and that the said Margaret Bowmer is a resident of Cloverport, in the State of Kentucky, and of full age.

5.

Your petitioners further represent that the said decedent, Joseph Holt, died seized and possessed of real estate in the city of Washington, District of Columbia, of the probable value of from $30,000 to $40,000, and also, so far as they are at present informed, the owner of personal property consisting of $66,000, of 3.65 regis-
3 tered bonds of the District of Columbia; $2,000, city of Louisville 5% bonds; $5,000, city of Louisville 4% bonds; each;
4 District of Columbia 6% bonds of the par value of $100 ʌ 16 Belt Line Railroad bonds of the par value of $500 each; 220 shares of the stock of the National Bank of Commerce of New York; two notes, aggregating the sum of $11,000, and about $12,000 in cash; that, in addition to the foregoing, the said decedent left a large library of miscellaneous books, besides his household furniture, bric-a-brac, paintings, silver and table ware, and a horse and vehicle, the value of which your petitioners are unable with any degree of accuracy to estimate.

[* Words enclosed in brackets erased in copy.]

6.

Your petitioners further show that, so far as they are advised, after careful and dilligent search and inquiry in respect of a will, the said Joseph Holt died intestate.

7.

Your petitioners further show that, excepting possibly some small grocery bill and about $90 of servant hire, together with the expense of his last illness and funeral, the whole of which will not aggregate to exceed $500, the said decedent left no indebtedness.

8.

Your petitioners further represent that, so far as they have any knowledge of the said estate, the investments as above set forth are all first class and may be divided among the parties in interest, as hereinbefore named, in kind, and that the said household effects and library may likewise be so divided; that the cash on hand is largely in excess of any demands that can be made upon said estate and may also be divided without unnecessary delay.

4 Wherefore your petitioners pray that such action may be taken by this honorable court as may be proper in the premises, and that your petitioners may be appointed administrators of said estate.

W. D. HOLT.
W. G. STERETT.
JOHN W. HOLT.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the District aforesaid, personally appeared Washington D. Holt, William G. Sterett, and John W. Holt, who, being duly sworn, say that they have read the foregoing petition by them subscribed and are acquainted with the contents thereof; that the matters and things therein stated as of their own knowledge are true, and that as to the matters and things therein stated upon information and belief they believe them to be true.

W. D. HOLT.
W. G. STERETT.
JOHN W. HOLT.

Subscribed and sworn to before me this 17th day of August, 1894.

EDMUND VAN DYKE,
Notary Public.

[SEAL.]

5 *Order Granting Letters of Administration to the National Safe Deposit, Savings and Trust Company, D. C.*

Filed September 28, 1894.

In the Supreme Court of the District of Columbia.

In re the Estate of JOSEPH HOLT, Dec'd. Probat- No. 6283.

Upon consideration of the petition of the National Safe Deposit, Savings & Trust Company of the District of Columbia and the other papers filed and proceedings had herein, and it appearing to the satisfaction of the court that the said Joseph Holt departed this life intestate, it is, this 28th day of September, A. D. 1894, by the court adjudged, ordered, and decreed that letters of administration on said estate be, and the same are hereby, granted unto the National Safe Deposit, Savings and Trust Company of the District of Columbia.

CHAS. C. COLE,
Asso. Justice.

6 This is to give notice—

That the subscriber, of the District of Columbia, has obtained from the supreme court of the District of Columbia, holding a special term for orphans' court business, letters of administration on the personal estate of Joseph Holt, late of the District of Columbia, deceased.

All persons having claims against the said deceased are hereby warned to exhibit the same, with the vouchers thereof, to the subscriber on or before the 28th day of September next. They may otherwise by law be excluded from all benefit of the said estate.

Given under its hand this 28th day of September, 1894.

THE NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY OF THE DISTRICT OF COLUMBIA,
By its president, BENJAMIN P. SNYDER.

JEREMIAH M. WILSON, *Proctor.*

7 *Petition for Probate and Letters Testamentary.*

Filed September 20, 1895.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Will of JOSEPH HOLT, Deceased. No. 6283 [Doc.]*

The petition of Luke Devlin respectfully represents:

1. That he is a citizen of the United States and a resident of Montgomery county, in the State of Maryland.

[* Word enclosed in brackets erased in copy.]

2. That Joseph Holt, late a citizen of the United States and a resident of the city of Washington, in the District of Columbia, departed this life in said city and District on or about the first (1st) day of August, A. D. 1894.

3. That besides a considerable amount of real estate situated in said city and District, said testator died possessed of the following goods, chattels, and personal estate, to wit: $70,000, par value, in registered bonds of the District of Columbia, the estimated value of which is about $79,000; $7,000 in bonds of the city of Louisville, Kentucky; 16 bonds of the Belt Line railroad, of the District of Columbia, of the par value of $500.00 each and of the estimated value of $400 each; 220 shares of stock of the National Bank of Commerce of New York, of the par value of $100 each and
8 of the estimated value of $175.00 each; two notes aggregating the sum of $11,000.00, and about $12,000 in cash, besides household furniture, books, bric-a-brac, paintings, silver and table ware, and a horse and vehicle, which said last-enumerated goods and chattels are of the estimated value of about $3,500.00.

4. That said Joseph Holt left a last will and testament, bearing date the seventh (7th) day of February, 1873, which is herewith presented for probate, and that said decedent left him surviving, as his only heirs-at-law and next of kin, the following persons:

Washington D. Holt, a nephew and resident of Kentucky.

John W. Holt, a nephew and resident of Yazoo City, Mississippi.

Lockie Holt, Robert Holt, Thomas Holt, and James Holt, nephews, and Sarah Holt, a niece, who are non-residents of the District of Columbia and whose place- of residences are to your petitioner unknown.

William G. Sterrett, a nephew and a resident of the city of Washington, in the District of Columbia, and Margaret Bowmer, a niece, whose is a resident of Cloverport, in the State of Kentucky.

Joseph Holt, a great-nephew, who resides at Sherman, Texas.

5. That heretofore, to wit, on the 28 day of August, A. D. 1894, upon the petition of Washington D. Holt, John W. Holt, and William G. Sterrett, alleging, among other things, that said testator died intestate, letters of administration were granted to the National Safe Deposit, Savings and Trust Company, a body corporate doing business in the District of Columbia, in whose custody your petitioner is informed and believes, and therefore avers, the personal estate of the said testator now is.

9 Wherefore your petitioner prays as follows:

1. That the said will be admitted to probate and record and letters testamentary granted unto him accordingly.

2. That the order appointing the National Safe Deposit, Savings and Trust Company administrator of said decedent be declared void and for naught held.

3. And that your petitioner may have such other and further relief as the nature of his case may require.

LUKE DEVLIN.

DISTRICT OF COLUMBIA, *ss*:

I, Luke Devlin, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the allegations therein set forth as of my own personal knowledge are true and those set forth upon information and belief I believe to be true.

LUKE DEVLIN.

Subscribed and sworn to before me this 18 day of September, A. D. 1895.

[SEAL.] GEO. K. FINCKEL,
Notary Public.

10 DISTRICT OF COLUMBIA, *ss*:

On the — day of ——, A. D. 1895, came Luke Devlin and made oath on the Evangels of Almighty God that he does not know of any will or codicil of Joseph Holt, deceased, late of the city of Washington, District of Columbia, other than the foregoing instrument in writing, and that he received the same from L. P. Wright, Esq., register of wills, on or about the 26th day of August. A. D. 1895.

LUKE DEVLIN.

Subscribed and sworn to before me this 18th day of September, A. D. 1895.

GEO. K. FINCKEL.
[SEAL.] *Notary Public.*

11 *Caveat.*

Filed October 18, 1895.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Late of the City of Washington, District of Columbia, Deceased. No. 6283, Docket No. 20.

To the honorable the justice of the supreme court of the District of Columbia, holding said special term for orphans' court business:

The petition of Washington D. Holt, William G. Sterrett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt respectfully represents:

A certain paper-writing bearing date the 7th day of February, A. D. 1873, purporting to be the last will and testament of Joseph Holt, deceased, in and by which Luke Devlin, of the city of Washington, District of Columbia, is appointed executor thereof, having been heretofore propounded before this court as such last will and testament of the said Joseph Holt, deceased, for probate in and by said court, but upon which no action has yet been taken by the

court admitting the same to probate, the undersigned caveators, Washington D. Holt, William G. Sterrett, Margaret Bowmer,
12 John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, pursuant to the law and statute in such case made and provided, do hereby contest the said probate and the validity of the said paper-writing so purporting to be such last will and testament of the said Joseph Holt, deceased, and for that purpose allege against the validity of such alleged will and against the competency of the proof thereof as follows:

1. That the said paper-writing is not the last will and testament of the said Joseph Holt, deceased.

2. That the said paper-writing so purporting to be the last will and testament of the said Joseph Holt, deceased, is a forgery and never was signed or acknowledged by the said alleged testator.

3. That the said paper-writing never was signed by the alleged contesting witnesses whose names are affixed thereto as the witnesses to the execution of said alleged will, nor was the same declared to be his last will and testament by the said alleged testator in the presence of said alleged witnesses or either of them.

4. These caveators further allege that the said attesting witnesses to said alleged will, whose names appear as such on the face of said paper-writing, did not, nor did either of them, sign his or her name as a witness to said alleged will at the request of the said alleged testator nor in his presence nor in the presence of each other.

5. These caveators further allege that even if the said alleged testator did execute and sign the said paper-writing, which they deny as aforesaid, yet these caveators say that the said paper-writing purports to dispose of both real and personal property, but it
13 does not appear thereby that the same was duly executed, as required by law, in this, that it is required by law that such last will and testament shall be attested and subscribed in the presence of the testator by three or four credible witnesses, or else it shall be utterly null and void and of none effect, whereas it does not appear by the face of said alleged last will and testament of the said Joseph Holt, deceased, that the said attesting witnesses did so subscribe the same in his presence.

6. These caveators further allege that even if the said alleged testator and the said alleged witnesses did sign and witness the said paper-writing, as the face of said alleged will purports, which these caveators deny, yet the said paper-writing so propounded for probate and record is not the last will and testament of the said Joseph Holt, deceased, because these caveators say that even if the said alleged testator ever did sign and execute the same, which they deny, it was afterwards by him revoked, annulled, and destroyed by the removal and tearing of his name from said paper-writing by the said alleged testator and by otherwise mutilating and by burning the same, which mutilation and destruction was done with the intent to revoke and cancel the said alleged will, and these caveators say that thereby and by other acts of the said Joseph Holt, deceased, done

with the purpose and intent to cancel and revoke the said alleged will, the same was cancelled and revoked.

7. These caveators further say that even if the said alleged will was in fact ever executed by the said Joseph Holt, deceased, which they deny, and even if the same was, therefore, during his lifetime in his possession, yet the same was not in the possession of the said alleged testator at the time of his death and was not found in his possession or with any of his papers or effects or in any
14 custody or keeping which was known to or authorized by him; but, on the contrary, the same had been mutilated and destroyed as aforesaid and was fraudulently and without disclosing his name or address sent to the register of wills of the District of Columbia through the mails by some unknown person after having been pasted together so as to render it legible; this without the knowledge or consent of the said Joseph Holt, deceased.

8. These caveators further say that even if the said Joseph Holt, deceased, did execute and sign the said paper-writing, which they deny, yet they allege that such signature and execution was procured by the fraud and undue influence practiced against and upon the said Joseph Holt, deceased, by some person or persons to them now unknown.

Wherefore these caveators pray that the said paper-writing may be refused probate, and that issues may be framed between these caveators and the proponents of said alleged will and sent to the circuit court, to be there tried by jury in order to determine the allegations of fact bearing upon the validity of said will.

WASHINGTON D. HOLT.
W. G. STERETT.
MARGARET BOWMER,
By W. G. STERETT.
JNO. W. HOLT.
LOCKIE W. IGLEHART.
SARAH HOLT,
By JNO. W. HOLT, *Guardian.*
ROB'T S. HOLT,
THOMAS HOLT,
JAMES HOLT,
By JNO. W. HOLT.

SHELLABARGER & WILSON,
Att'ys for Caveators.

15 DISTRICT OF COLUMBIA, *ss:*

Before me, Edmund Van Dyke, a notary public in and for the District aforesaid, personally appeared Washington D. Holt, one of the caveators whose name is subscribed to the foregoing petition, who, being duly sworn, says that he has read the foregoing caveat by him subscribed and is acquainted with the contents thereof, and that the matters and things therein stated are true as he verily believes.

WASHINGTON D. HOLT.

Subscribed and sworn to before me this 17th day of October, A. D. 1895.

[SEAL.] EDMUND VAN DYKE,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss:*

Before me, Edmund Van Dyke, a notary public in and for the District aforesaid, personally appeared William G. Sterrett, for himself and Margaret Bowmer, and John W. Holt, for himself, Sarah Holt, Robert S. Holt, Thomas Holt, [and]* James Holt, * who, being duly sworn, say that they have read the foregoing and annexed caveat by them subscribed and are acquainted with the contents thereof, and that the matters and things therein stated are true as they verily believe.

W. G. STERETT.
JNO. W. HOLT.

* and Lockie W. Iglehart.

Subscribed and sworn to before me this 18th day of October, A. D. 1895.

[SEAL.] EDMUND VAN DYKE,
Notary Public, D. C.

16 *Answer of Luke Devlin, Lizzie Hynes, and Josephine Holt Throckmorton.*

Filed December 2, 1895.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283, Doc. No. 20.

Answer of Luke Devlin, Lizzie Hynes, and Josephine Holt Throckmorton to caveat.

The respondents Luke Devlin, Lizzie Hynes, and Josephine Holt Thockmorton, to so much and such parts of the petition of Washington Holt and others, filed herein on the eighteenth day of October, A. D. 1895, as they are advised it is material for them to make answer unto, answering, say:

1. They affirm that, according to their information and belief, the paper-writing dated the seventh day of February, A. D. 1873, purporting to be the last will and testament of the said Joseph Holt and propounded as such by Luke Devlin, one of the respondents in this cause, is in fact the last will and testament of the said Joseph Holt, and they deny the allegations to the contrary in said petition contained.

2. They deny the allegations in the second paragraph of the said

[* Word enclosed in brackets erased in copy.]

petition that the said paper-writing is a forgery, and that the same was not signed and acknowledged by the said testator.

17 3. They deny, according to their information and belief, the allegation in the third paragraph of said petition contained that the said paper-writing was not signed by the attesting witnesses whose names are thereto affixed, and that the said instrument was not declared by the above-named testator as his last will and testament in the presence of said witnesses and of each of them, and as aforesaid they assert the contrary of each of said allegations to be true in fact.

4. These respondents believe the allegation of the fourth paragraph of said petition that the attesting witnesses did not sign their names as witnesses to the said will at the request of said testator nor in his presence nor in the presence of each other to be wholly untrue in fact, and as they are advised and believe, and therefore aver, the said allegations are also wholly immaterial in law for all purposes touching the validity and effect of the said instrument in so far as the jurisdiction of this court is concerned.

5. The fifth paragraph of said petition for caveat, as *this* respondent *is* advised and believes, and therefore avers, sets forth only matters of law and requires no answer from them. Nevertheless, as they are advised and believe, and therefore aver, the said fifth paragraph is insufficient in law, in that it does not aver that the said paper-writing was not attested and subscribed in the testator's presence by three credible witnesses, and, further, because such attestation is necessary only to the validity of the said paper-writing in so far as it affects the real estate of the testator, whereas the present proceeding in this court relates wholly to the personal estate of said decedent, to which personal estate the jurisdiction of this court is exclusively confined, and the respondents pray the same benefit of such insufficiency as if they had demurred to said fifth paragraph.

18 6. These respondents do not admit, but on the contrary deny, upon information and belief that the said paper-writing was revoked by the said testator or that the said instrument was mutilated or burned by him for the purpose of revocation or cancellation or for any other purpose whatsoever, as is alleged in the sixth paragraph of the said petition, and call for strict proof as to each and every of said allegations.

7. These respondents have no means of knowing and do not in fact know and are accordingly unable either to admit or deny whether the said paper-writing was in the possession of the testator at the time of his death, or whether it was found among his papers or effects, or in whose custody said paper-writing was at the time of his death or afterwards, and they call for strict proof as to each and every of the allegations in said seventh paragraph contained touching the custody and keeping of said instrument. They admit on information and belief that the said paper-writing was forwarded to the register of wills of the District of Columbia through the mails by some person to these respondents unknown, and that said instrument had apparently been worn where creased or folded and

had been pasted upon another paper because of such wear, but they deny that it depended or depends in any manner upon such pasting for its legibility. They deny that the sending of said instrument to the register of wills was fraudulent, and aver that if there was any fraud in the matter it consisted in withholding the said paper-writing from the files of the register of wills' office beyond the period within which the custodian or other person into whose possession it had come was required by law to file it. Said paper was forwarded to the register of wills heretofore, to wit, on the twenty-sixth day of August, A. D. 1895, more than a year after the testator's death, and presumably without his knowledge, as the said seventh para-
19 graph of the petition alleges.

8. These respondents are wholly unaware of any fraud or undue influence practiced against or upon the said testator by any person or persons whomsoever, and believe the allegations of said petition that the execution of said will was procured by such means to be wholly unfounded and untrue.

If the said paper-writing is a forgery, or if it was not signed by the said Joseph Holt, or if it was procured by fraud or undue influence, or if it was revoked by him, these respondents do not desire its admission to probate and record; but believing that none of the allegations in said petition touching the validity of the said instrument are well founded in point of fact, and that the same are wholly untrue, they unite in the prayer in said petition contained that appropriate issues may be framed and sent to the circuit court for trial by jury, in order to determine the question of their truth and of the validity of said will.

LUKE DEVLIN.
LIZZIE HYNES.
JOSEPHINE HOLT THROCKMORTON.

DISTRICT OF COLUMBIA, *ss:*

I, Luke Devlin, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof, and that the allegations therein set forth as of my own personal knowledge are true and those set forth upon information and belief I believe to be true.

LUKE DEVLIN.

Subscribed and sworn to before me this 19th day of November, A. D. 1895.

GEO. K. FINCKEL,
[SEAL.] *Notary Public.*

20 STATE OF KENTUCKY, }
Marion County, } *ss:*

I, Lizzie Hynes, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof, and that the allegations therein set forth as of my own personal knowledge are true, and those set forth upon information and belief I believe to be true.

LIZZIE HYNES.

Subscribed and sworn to before me this 27th day of November, A. D. 1895.

S. B. BOTTOM,
[SEAL.] *Notary Public, Marion County, Ky.*

My commission expires 2nd Feb'y, 1898.

——— ———, *ss:*

I, Josephine Holt Throckmorton, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof, and that the allegations therein set forth as of my own personal knowledge are true, and those set forth upon information and belief I believe to be true.

JOSEPHINE HOLT THROCKMORTON.

Subscribed and sworn to before me this 20th day of November, A. D. 1895.

E. ORMONDE POWER,
[SEAL.] *Notary Public, N. Y Co.*

21 *Order Transmitting Issues to Circuit Court.*

Filed March 20, 1896.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283 Doc. No. 20.

Upon the motion of the counsel for the caveators in this case, counsel for the caveatees being present and the matter having been argued and submitted to the court, it is this 20th day of March, A. D. 1896, ordered that the following issues in this case be certified to the supreme court of the District of Columbia, holding a special term as a circuit court, for trial by a jury.

1. Was the paper-writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?

2. Was the execution of said paper-writing procured by fraud exercised and practiced upon said Joseph Holt by any person or persons?

3. Was the execution of said paper-writing procured by the undue influence of any person or persons?

4. If the said paper-writing was executed by the said
22 Joseph Holt as his last will and testament, has the same been revoked by said testator?

A. B. HAGNER,
Asso. Justice.

23 *Findings of Jury.*

Filed June 30, 1896.

Supreme Court of the District of Columbia.

THURSDAY, *June* 25, 1896.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

LUKE DEVLIN, Executor, *et al.*, Caveatees, Plaintiffs, *v.* WASHINGTON D. HOLT *et al.*, Caveators, Defendants.	At Law. No. 39648, Cal. 798.

Come again the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say: In answer to the first issue, "Was the paper-writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?" they answer, "No." In answer to the second issue, "Was the execution of said paper-writing procured by fraud exercised and practiced upon said Joseph Holt by any person or persons?" they answer, "No." In answer to the third issue, "Was the execution of said paper-writing procurred by the undue influence of any person or persons?" they answer, "No." In answer to the fourth issue, "If the said paper-writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by said testator?" they answer, "No, because it was not executed;" and the court orders the clerk to certify said an-
24 swers to that branch of the court from which said issues came.

DISTRICT OF COLUMBIA, *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy of the answers of the jury to the issues in above-entitled cause.

[SEAL.] Witness my hand and the seal of said court this 30th day of June, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

25 *Motion for Judgment.*

Filed July 1, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —.

Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her

guardian: Robert S. Holt, Thomas Holt, and James Holt, caveators in this case and next of kin of Joseph Holt, deceased, move the court to enter a final judgment and decree in this case declaring and adjudging that the paper-writing dated February 7th, 1873, filed in this court on the 26th day of August, 1895, and purporting to be the last will and testament of Joseph Holt, was never executed by the said Joseph Holt and is not his last will and testament, and further adjudging that the same shall not be admitted to probate as such last will and testament.

And the said caveators and next of kin further move the court to direct the administrator heretofore appointed in this case to proceed with the administration according to law.

J. M. WILSON,
WORTHINGTON & HEALD,
Attorneys for Caveators and Next of Kin of Joseph Holt.

26 To Messrs. J. J. Darlington, Blair Lee, and Benjamin Butterworth, attorneys for Elizabeth Hynes, Josephine Holt Throckmorton, and Luke Devlin, caveatees:

Take notice that we shall call up the above motions on Friday, July 3, at the opening of the court or as soon thereafter as counsel can be heard.

J. M. WILSON,
WORTHINGTON & HEALD,
Attorneys for Caveators and Next of Kin of Joseph Holt.

Service accepted.
J. J. DARLINGTON,
For Caveatees.

27 *Order Denying Probate of Paper-writing Dated February 7, 1873.*

Filed July 10th, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —.

Upon consideration of the motion of Washington D. Holt and others, caveators in this case, which was filed in this cause July 1, 1896, and upon consideration also of the certificate of the clerk of this court, filed herein on the 30th day of June, 1896, and upon its appearing to the court that counsel for Elizabeth Hynes, Josephine Holt Throckmorton, and Luke Devlin, caveatees in this case, have been duly notified that said motion would be called up at this time, it is this 10th day of July, 1896, ordered, adjudged, and decreed that the paper-writing dated February 7th, 1873, filed in this court on the 26th day of August, 1895, purporting to be the last will and testament of said Joseph Holt, was never executed by the said Joseph Holt as or for his last will or testament, and that the same

is not his will, and that probate of the same be, and is hereby, denied; and thereupon the caveatees, Luke Devlin, Elizabeth Hynes, and Josephine H. Throckmorton, in open court pray an appeal herefrom upon their exceptions to the rulings of the trial
28 justice at the trial of the issues in said cause, which appeal is allowed by the court, and the penalty of the appeal bond, to operate as a supersedeas, is fixed in the sum of five thousand dollars, provided that the caveatees file in this court a consent in writing within seven days from this date that the court may at any time during the pendency of the appeal order the sale of any of the securities or the investment of any of the funds in the hands of the administrator.

CHAS. C. COLE,
Asso. Justice.

29 *Consent of Elizabeth Hynes.*

Filed July 17, 1896.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —, Doc. —.

Now comes Elizabeth Hynes, one of the caveatees in the above-entitled cause, and consents that the court may at any time during the pendency of the appeal noted herein on the 10th day of July, A. D. 1896, order the sale of any of the securities or the investment of any of the funds in the hands of the administrator heretofore appointed in this cause.

ELIZABETH HYNES.

Witness-:
C. C. McCHORD.
MRS. J. F. HARCOURT.

30 *Consent of Josephine H. Throckmorton.*

Filed July 17, 1896.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —, Doc. —.

Now comes Josephine Holt Throckmorton, one of the caveatees in the above-entitled cause, and consents that the court may at any time during the pendency of the appeal noted herein on the 10th day of July, A. D. 1896, order the sale of any of the securities or the investment of any of the funds in the hands of the administrator heretofore appointed in this cause.

JOSEPHINE HOLT THROCKMORTON.

Witness:
C. B. THROCKMORTON,
Major, U. S. Army.

31 *Consent of Luke Devlin.*

Filed July 17, 1896.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —, Doc. —.

Now comes Luke Devlin, one of the caveatees in the above-entitled cause, and consents that the court may at any time during the pendency of the appeal noted herein on the 10th day of July, A. D. 1896, order the sale of any of the securities or the investment of any of the funds in the hands of the administrator heretofore appointed in this cause.

LUKE DEVLIN.

Witness:
ALEXANDER T. HENSEY.

32 *Stipulation for Prosecution of Appeal.*

Filed July 30, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. —.

It is hereby stipulated by and between counsel for the caveators and caveatees in the above-entitled cause respectively that the caveatees Josephine H. Throckmorton and Luke Devlin may give their appeal bond in the sum of five thousand dollars ($5,000), with surety approved by the court or a justice thereof, and may prosecute their appeal from the decree of July 10th, 1896, without concurrence in said bond or in said appeal by the caveatee Elizabeth Hynes, in like manner and with like effect as if there had been a formal summons and severance as to said caveatee, Elizabeth Hynes.

J. M. WILSON,
A. S. WORTHINGTON,
Counsel for Caveatees.
J. J. DARLINGTON,
Of Counsel for Caveators.

33 *Withdrawal of Appeal by Elizabeth Hynes.*

Filed August 3, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283.

Elizabeth Hynes, one of the caveatees in the above-antitled case, hereby withdraws and abandons the appeal taken by her to the

Court of Appeals of the District of Columbia from the judgment and order entered herein on the tenth day of July, 1896.

ELIZABETH HYNES.

ZELLA M. HULSE, *Witness.*

34 *Stipulation of Counsel as to Part Distribution, &c.*

Filed October 23, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283.

It is hereby agreed—

1. That [at any time within — days from this date] * the appeal bond in the penal sum of five thousand dollars, which was filed herein on the 30th day of July, 1896, may be cancelled and withdrawn upon there being filed in lieu thereof a bond in the penal sum of five hundred dollars, signed by Josephine Holt Throckmorton and Luke Devlin, as principals, and by the Fidelity & Deposit Company of Maryland, [company] * as surety, said bond to be in other respects similar to said bond in the penal sum of five thousand dollars and to be filed with the approval of the court.

2. That after said bond in the penal sum of five thousand dollars shall have been so cancelled and withdrawn and said bond in the penal sum of five hundred dollars substituted therefor the appeal heretofore taken in this case to the Court of Appeals by said Josephine Holt Throckmorton and Luke Devlin shall be held to operate as a supersedeas only as to the one-half of the personal estate
35 of said Joseph Holt which in and by the paper in controversy in this case, dated February 7th, 1873, purporting to be the last will and testament of said Joseph Holt, is bequeathed to said Josephine Holt Throckmorton.

3. That after such substituted bond shall have been filed with the approval of the court said Josephine Holt Throckmorton and Luke Devlin shall not in any way oppose the immediate distribution, under an order of the court or otherwise, of the one-half of said estate which said paper-writing purports to bequeath to Elizabeth Hynes, under the name of Lizzie Hynes, provided, however, that of said one-half of said personal estate there shall be retained by the administrator heretofore appointed in this case, subject to the order of this court, the sum of ten thousand dollars to meet any claim that may be made by said Luke Devlin and allowed by the court on account of commissions upon said one-half of said personal estate in case said paper-writing should be finally admitted to probate as the last will and testament of said Joseph Holt, and to meet also such expenses, if any, of litigation as may be held properly chargeable to said one-half of said personal estate.

[* Words enclosed in brackets erased in copy.]

4. That this agreement shall be operative only in case the court shall make a final order directing a distribution of said one-half of said personal estate (less the sum of ten thousand dollars above agreed to be retained) to the next of kin of said Joseph Holt, to be embodied in the order approving such substituted bond.

A. S. WORTHINGTON,
Attorney for John W. Holt and Other Caveators.
J. J. DARLINGTON,
Sol. for Josephine H. Throckmorton & Luke Devlin.
JEREMIAH M. WILSON,
Attorney for Washington D. Holt.

36 *New Supersedeas Bond.*

Filed May 7, 1897.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of JOSEPH HOLT, Deceased. No. 6283, Admr. Doc.

Know all men by these presents that we, Josephine H. Throckmorton and Luke Devlin, as principals, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Washington D. Holt, William G. Sterrett, Margaret Bowmer, John M. Holt, Lockie M. Iglehart, Sarah Holt, Robert S. Holt, Thomas Holt, and James Holt in the full sum of five hundred dollars, to be paid to the said Washington D. Holt, William G. Sterrett, Margaret Bowmer, John M. Holt, Lockie M. Iglehart, Sarah Holt, Robert S. Holt, Thomas Holt, and James Holt, their executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 23d day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Josephine H. Throckmorton and
37 Luke Devlin have prosecuted an appeal to the Court of Appeals of the District of Columbia to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia, and heretofore gave their supersedeas bond to prosecute their appeal in the penalty of $5,000, which bond, by stipulation between the parties in interest, through their counsel, respectively, it has been agreed shall be withdrawn upon the substitution of a new supersedeas bond in the penalty of $500, pursuant to which stipulation and with the approval of the court this bond is filed in substitution for said prior bond:

Now, therefore, the condition of this obligation is such that if the above-named Josephine H. Throckmorton and Luke Devlin shall prosecute their said appeal to effect and answer all damages and

costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOSEPHINE HOLT THROCKMORTON. [SEAL.]
LUKE DEVLIN. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
Attest: HENRY B. PLATT, *Vice-President.*
[SEAL.] JOHN W. WOOTEN, *Attorney.*

Sealed and delivered in presence of—
C. B. THROCKMORTON.
S. B. BUSHNELL.

Approved the 7th day of May, 1897.
A. B. HAGNER,
Justice S. C. D. C.

38 *Order Extending Time within which to File Transcript of Record.*

Filed June 30, 1897.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Will of JOSEPH HOLT. No. 6283, Admr. Doc. 20.

It is by the court, upon consent of the parties, this 30th day of June, A. D. 1897, ordered that the time within which the caveatees may file in the Court of Appeals the transcript of the record in their pending appeal from the decree of this court denying probate and record of the paper-writing bearing date the 7th day of February, A. D. 1873, purporting to be the last will and testament of the said Joseph Holt, is hereby extended for the period of thirty days from this date.

A. B. HAGNER,
Asso. Justice.

We consent.
J. M. WILSON,
A. S. WORTHINGTON,
For Caveators.
J. J. DARLINGTON,
For Caveatees.

39 Form 43.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, J. Nota McGill, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court busi-

ness, do hereby certify the foregoing pages, numbered from 1 to 38, inclusive, to be a true copy of the originals of certain papers on file in the office of the register of wills in case No. 6283, estate of Joseph Holt, deceased, except the notice to creditors, page 6, of which no copy is on file in this office.

Seal Supreme Court of the District of Columbia, Probate Jurisdiction.

In testimony whereof I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 22nd day of July, anno Domini 1897.

J. NOTA McGILL.

40 Filed Jun- 30, 1897. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

In the Matter of the Will of JOSEPH HOLT. No. 39648. At Law. Doc. —.

Bill of Exceptions.

Filed for settlement by court November 3d, 1896.
6, 30, '97—34–411.

41 In the Supreme Court of the District of Columbia.

In the Matter of the Will of JOSEPH HOLT. At Law. No. 39648.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial on the 18th day of May, A. D. 1896, before Mr. Justice Bradley and a jury, Messrs. J. M. Wilson and A. S. Worthington appearing for the caveators and Messrs. Benjamin Butterworth, Blair Lee, and J. J. Darlington appearing for the caveatees.

Thereupon the caveatees offered testimony tending to show that Ellen B. E. Sherman, one of the attesting witnesses to the paper-writing bearing date the 7th day of February, 1873, and purporting to be the last will and testament of Joseph Holt, died in November, 1888; that U. S. Grant, another of said attesting witnesses, died on the 23rd day of July, 1885, and that William T. Sherman, the remaining attesting witness, died on February 14, 1891.

Thereupon, further to maintain the issues on their part, the caveatees produced as a witness on their behalf JOHN SHERMAN, who testified that he was a brother of the said William T. Sherman; that he was familiar with his handwriting, and that the lower signature to the said will was, in his opinion, the
42 genuine signature of the said William T. Sherman.

Said caveatees further produced as a witness on their behalf FREDERICK DENT GRANT, who testified that he was the eldest son of the late U. S. Grant; that he had abundant opportunities for

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becoming familiar with his handwriting and signature, and that the signature "U. S. Grant" to the said instrument of February 7, 1873, was, in his opinion, the genuine signature of his father.

The caveatees further produced as a witness on their behalf P. TECUMSEH SHERMAN, who testified that he was a son of William T. Sherman and Ellen B. E. Sherman; that he had frequently seen the said Ellen B. E. Sherman write, was familiar with her signature, and that the signature "Ellen B. E. Sherman" was, in his opinion, written by her.

On cross-examination the said witness further testified that the said Ellen B. E. Sherman usually wrote her name "Ellen Ewing Sherman," but that it was her habit to sign all legal papers "Ellen B. E. Sherman."

The caveatees further offered as a witness in their behalf HENRY B. BURNETT, who testified that he became acquainted with the late Joseph Holt in 1863; that he frequently saw the said Holt write, had considerable correspondence with him, which continued to the year 1889, and was familiar with his handwriting, and that both the body of the said paper-writing dated February 7, 1873, and the signature "J. Holt" were, in his opinion, in the handwriting of the said Joseph Holt.

Thereupon J. NOTA MCGILL, a witness produced on behalf of the caveatees, testified that he became register of wills of the Dis-
43 trict of Columbia on the 4th day of September, 1895; that at that time he found the said paper-writing of February 7, 1873, in the safe of the register of wills, and that the said paper-writing was in the same condition as to apparent burning and mutilation at that time as at the trial, except that witness had put certain strips on the back of it.

Thereupon it was agreed by counsel for the caveatees that said paper-writing came to the office of the register of wills by mail, anonymously and from an unknown source, on the 26th day of August, 1895, in an envelope addressed and postmarked as follows:

"To the register of wills, Washington, D. C."

Thereupon the said paper-writing of February 7, 1873, purporting to be the last will and testament of said Joseph Holt, was read in evidence by counsel for caveatees, which was objected to by the caveators on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated and had been sent to the register of wills anonymously, and that it was incumbent upon the caveatees to explain these circumstances before the will could be read to the jury, but the court overruled the said objection and admitted the said paper, which was read to the jury and was in the words and figures following:

44½ Thereupon ELIZABETH HYNES, one of the caveatees, testified on her own behalf that the said paper-writing was never in her possession, and that she never saw it until it was shown her on the witness-stand at the trial.

LUKE DEVLIN, another of the caveatees and the person named as executor in said paper-writing, thereupon testified that the said paper-writing was never in his possession, and that he first saw it in the office of the register of wills on the day it had been received there.

45 On cross-examination the said Devlin testified that he knew the said Joseph Holt well since 1862, having been a copyist and messenger at that time in the office of the judge advocate general when said Holt succeeded to that office; that he continued to be employed in said office until 1876, when the said Holt retired therefrom; that he had little communication with him in relation to office matters; that he visited him once or twice at his house; that he was in the habit of meeting him socially at the residence of Mrs. Throckmorton, Sr., the grandmother of Miss Josephine H. Throckmorton, from 1865 to 1878; that he had not seen Mrs. Throckmorton, Sr., more than four or five times during a period of ten years preceding the receipt of the will at the register's office, and on learning of the existence of the will he had to consult the city directory to ascertain where she then lived; that on the day the will reached the register of wills he received a telephone message from the register, went to his office, and saw the will for the first time; then called on Mrs. Throckmorton, Sr., and on the same day telegraphed Miss Josephine H. Throckmorton of the finding of the will, having first learned the address of her father upon inquiry at the War Department; that he called on several occasions in later years at said Holt's house and was informed by the colored servants that he was out or that he was engaged, and asked witness to call again, the last of these visits being about April 9, 1894, shortly before his death; that he met said Holt outside on several occasions, the last of which was about two years before his death, and conversed with him.

46 Thereupon JOSEPHINE H. THROCKMORTON, the remaining caveatee, testified that she never had the will in her custody; that she never saw it until it was shown her by the register of wills in the latter part of October, 1895, and that she first knew of its existence through a telegram from Mr. Devlin, which she, in New York city, received from Luke Devlin in Washington, August 26, 1895.

On cross-examination said witness further testified that she knew Luke Devlin when a child and had not seen him since until after the will was filed.

Thereupon the caveatees announced their *prima facie* case closed, but counsel for the caveators objected that it was incumbent upon the caveatees to put in all their testimony essential to the establish-

ment of the alleged will before caveators were called upon to offer any; whereupon the court ruled that, because of the fact that there was no attesting clause to the will, it was proper and necessary for the caveatees to offer all the evidence they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the will, and the counsel of the caveatees accepted the said ruling as being a matter within the discretion of the court.

47 Thereupon the caveatees offered testimony tending to prove that the testator had corresponded with Elizabeth Hynes for forty years, and that in her opinion both the body of the will and the signature were in his handwriting; that the caveatee Luke Devlin had had daily opportunity for thirteen years of becoming familiar with his handwriting, and that the signature to said instrument was undoubtedly in testator's handwriting, and that the caveatee Josephine Holt Throckmorton had corresponded with him, was familiar with his handwriting, knew his signature, and that both the will and signature were in the handwriting of the said Joseph Holt.

The caveatees further produced as a witness on their behalf WILLIAM S. YEATMAN, who gave testimony tending to prove that he had been disbursing officer in the War Department since 1886; that numerous vouchers and other papers containing the signature of the late Joseph Holt came into his official possession, and that he was familiar with the signature of the said Holt; that he had been in the War Department twenty-five or thirty years, during all of which time he had seen the signatures of said testator upon official papers; that these papers are still in the department and witness still has occasion to refer to them, and that the signature "J. Holt" to the said paper-writing of February 7, 1873, was in the handwriting of said testator.

On cross-examination said witness further testified that testator had several styles of signature—sometimes inclining to the right, sometimes upright, and sometimes backhand; that there was a similarity about all his signatures, however, that he could

48 find a signature just like that to the will, and would do so if the necessary requisition were made on the Secretary of War; that testator's handwriting was variable at all times, but there was a general character to his writing that was individual.

Further to maintain the issues on their part joined the caveatees produced as witnesses on their behalf the Rev. John G. Butler, Theophilus Gaines, Charles B. Throckmorton, Mrs. Fannie W. Throckmorton, John C. Hesse, Robert R. Hitt, Franklin T. Howe, Mary McChord Ray, and A. E. H. Johnson, all of whom testified that they had seen the testator write, had corresponded with him, were familiar with his handwriting, and that both the body of the will and the signature of the testator thereto were, in their opinion, in the handwriting of the said Joseph Holt.

And upon the cross-examination of the said MARY MCCHORD RAY the following questions were asked and answers given :

Q. Do you know of your own knowledge of any difficulty between your husband and Judge Holt?

Mr. DARLINGTON: I object to that. I cannot see the relevancy of the inquiry.

The WITNESS: I cannot say it was a difficulty.

Mr. DARLINGTON: This lady has testified to his handwriting, and she is asked now as to the nature of some misunderstanding or difficulty between the testator and her husband.

Mr. WORTHINGTON: We will not press it. Upon being further advised by Judge Wilson, who has other information about the matter, I desire to ask the question and I propose to press
49 this inquiry for the purpose of showing the animus of this witness towards one of our clients, Mr. Washington Holt. I do not care to state what it is if my friend, upon that statement, will allow it to go in. If necessary, I will state to your honor just what I offer to prove.

Mr. DARLINGTON: I object to it because it is purely a collateral matter, and, in the second place, because I think she is incompetent to testify as to any matter of this nature which she can only know as a wife.

Mr. WORTHINGTON: So far as the question of its being collateral is concerned, certainly my friend will not contend that anything is collateral which tends to show that a witness is hostile to a party or some of the parties on the side opposite to that for which she is called. I offer to show that Judge Holt had a claim against this lady's husband, upon which he obtained a judgment, which he transferred to Mr. Washington Holt, and that Washington Holt proceeded to enforce it. The original debt was secured by a mortgage and he pressed it against them until it was settled.

Mr. DARLINGTON: We will concede that.

Mr. WORTHINGTON: I am not bound to take a confession.

Mr. DARLINGTON: Then I stand on my objection.

The COURT: The object which is asserted by counsel for the caveators seems to me to be a legitimate one—that is, to ascertain the bias of the witness. Of course, any controversy between her husband and Judge Holt would be collateral to this inquiry, but for the purpose of ascertaining the bias of the witness it is legiti*am*te.

Mr. WORTHINGTON: We all desire to be entirely candid in
50 the way we are proceeding here, and while we ask this for this purpose we will contend that it may well be competent for another purpose—that is, as tending to show the relations between Judge Holt and the people who claim under this will. Whether that is competent or not and whether my friend will object to it will appear at the proper time. It is a large question, which we are prepared to debate.

Mr. DARLINGTON: We are content with our exception for the present. We object to it for any purpose on the two grounds stated.

By Mr. WORTHINGTON:

Q. I now ask you, Mrs. Ray, if it is not true that about the time your correspondence with Judge Holt ceased he obtained a judgment for $4,000 or thereabouts against your husband.

A. I have not the least idea. My husband did not tell me his business. He knew my relationship with Judge Holt and I did not want to know about it. He was always a kind friend to me and I never talked with him on the subject.

Q. Do you know, as a matter of fact, that there was such a claim, and that it afterwards came into the hands of Mr. Washington Holt, one of these heirs?

A. I know that he had a note against my husband, who was unfortunate in his business and who was only getting a small salary. He tried to pay this note. Judge Holt had a note against my husband and my husband tried to pay it with the small salary that he got. He went down last Thanksgiving day and tried to have that note put aside for sixty days. I think that Mr. Washington Holt had a mortgage on our household effects and on our books, perhaps,
51 and he asked him to put it off for a few days. My husband told me when he came back——

Q. You cannot state what your husband said.

Mr. DARLINGTON: All she knows is what her husband told her.

The WITNESS: That is all I know about it.

By Mr. WORTHINGTON:

Q. I have asked you did you know anything about it of your own knowledge.

A. I do; I know that much. That is all I know except what my husband told me.

1st Exc.

To the cross-examination of which witness in relation to the said transaction between her husband, the testator, and Washington Holt the caveatees, by their counsel, then and there objected upon the grounds above set forth; but the court overruled said objection and permitted the said questions to be asked and required the witness to answer the same; to which rulings of the court and to each and every of the said questions and answers the caveatees, by their counsel, then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

The said witness, ROBERT R. HITT, upon his cross-examination was interrogated and testified as follows:

Q. You have confined your statement, I observe, carefully to the handwriting on that paper. You knew Judge Holt well, I presume?

A. I was well acquainted with him.

Q. You knew his capabilities, his characteristics, his standing as a lawyer, and all that?

A. Yes.

52 Q. I will ask you now to look at the phraseology of that paper which you have in your hand and state whether you find there any of the characteristics of Judge Holt in the composition of that paper.

Mr. DARLINGTON: I object to that. The question here is as to his handwriting.

The COURT: I am not so clear as to whether that is objectionable or not. The witness has testified that he knew Judge Holt and had known him for many years, and that he was associated with him in varying circumstances. In his answer as to the handwriting in the body of the paper he confines his answer carefully to handwriting. Whether that was done purposely or not I do not know.

Mr. BUTTERWORTH: Our point is, if your honor please, that the question would go to assailing the probability of his drawing that character of paper—as to whether he would have drawn his will in that way and as to whether he would have used peculiar phraseology. That opens up the entire question.

The COURT: The question was simply as to Judge Holt's characteristics.

Mr. BUTTERWORTH: In the matter of the phraseology.

The COURT: But not with reference to this paper.

Mr. WORTHINGTON: Yes; the question was with reference to the phraseology of this paper.

Mr. DARLINGTON: We object to it, first, because it is not responsive to the direct examination; secondly, it is not a part of our case-in-chief, but a part of the case of the other side, if competent at all, and, thirdly, because it is not a proper subject for
53 the cross-examination of the witness under the rules of evidence. By well-established rules a witness can testify to handwriting, but not as to his conjecture as to whether the testator would use a particular phraseology or not. We object to it on those three grounds.

Mr. WORTHINGTON: We have reached the stage in this case in which one of the most important questions in it has developed. The question now presented to the court is whether this is a matter that may be advanced by us on cross-examination of the witnesses for the plaintiffs. We are not to forget what we are trying. The testimony which is being adduced now by the plaintiffs is in support of the first issue, which is certified to this court and jury for determination, and that is whether Joseph Holt executed that paper as his last will and testament. For the purpose of supporting their contention that he did they have offered evidence as to his handwriting and the genuineness of his signature, which is and can be only the opinion of the persons who have qualified themselves to testify on the subject that it is his signature, or that they think it is his, to the best of their knowledge. While some of them are, perhaps, a little anxious and have said that it is his signature, yet in substance it must remain a mere matter of opinion, because they cannot know it unless they saw him write it. Witnesses have testified to that effect, and they have given testimony tending to show

that Judge Holt wrote that will, and that the paper, which is called a will, is in his handwriting, and that the signature at the
54 bottom of it is in his handwriting. I respectfully submit that it is the very heart of cross-examination to elicit from a witness who has testified in that way anything which will tend to show that Joseph Holt was not the creator of that paper. They have, of course, asked the question of the witnesses as to their opinion of the handwriting. Judge Hitt has, with emphasis, confined his opinion so far to the question of the appearance of the writing as though he wanted it understood that he does so confine it. We are now trying to find out what he wishes to be understood as saying, because we know no more about it than the court and jury. In order to illustrate that I will use the illustration that I made use of the other day: Suppose it should appear that this paper was full of bad spelling and bad grammar; that Judge Hitt, from his acquaintance and long association with Judge Holt, should know that he was a man who scarcely ever misspelled a word and who was entirely familiar with the rules of grammar, would it not be competent for us, on cross-examination, to show that in his opinion, looking at the whole paper, it was not Judge Holt's production, or from the manner in which it was expressed and the manner in which it was punctuated he saw something about it which indicated that Judge Holt was not the man who created it? They asked him about one part of the paper, and are we to be confined in our cross-examination to that part? I should think not, and therefore it is not collateral.

Mr. BUTTERWORTH: Where would you draw the line? What might you not go into if you can go into this?

Mr. WORTHINGTON: To answer that question would require me to make a half hour's speech, and it is not incumbent upon
55 me to do so. I say that this is not collateral because the question is not whether this is the handwriting of Judge Holt, but the question is whether this is his paper. I suppose that my friends will not contend that Judge Holt got somebody to write a will for him and then copied it with its unlawyerlike phrases, bad punctuation, or mispunctuation, wherever there is any, or no punctuation. If it appears upon an examination of the paper that it bears upon its face marks indicating that Judge Holt did not create it, I submit that it is an exceedingly relevant matter on their part of the case.

Let me here say to my friends, that they may not misunderstand what our position about this matter is, that when we claimed the other day and your honor decided that they were bound to go on with this evidence we understand and we would like to have them know that we understand that they are to offer all the evidence that they intend to offer to show that this is a genuine document, whether it refers to handwriting or whether it refers to something else. We understand that they are now engaged in producing all the evidence they intend to submit to show that Judge Holt was the creator of that paper. They cannot now offer testimony as to his handwriting and keep back other evidence until after we get

through with our case. The question whether this paper is in such a form and so expressed and so punctuated as to be his is just as much a part of their case as anything in it. The issue which this jury is to try is not whether that is in the handwriting of Judge Holt. The probate court has not sent here any issue as to
56 whether that paper is in the handwriting of Judge Holt, but the issue is whether he executed that paper as his last will and testament, and everything bearing upon that issue is a part of their case. It is what they are seeking to prove and establish before this jury. When they get through it will be time enough for us to be heard upon that matter.

I submit to your honor that anything that may be developed on cross-examination of any of their witnesses who have given testimony tending to establish their side of that issue which will tend to show that the issue should be found against them is competent at this time, is competent in the case, and is competent upon cross-examination.

After further argument the court said:

There is a good reason for receiving the opinion of witnesses as to the identity of handwriting, because handwriting has always its individuality. It is characteristic of the person who has written it, or at least that it the basis of the reason upon which persons who have a certain amount of familiarity with the handwriting which is in question are permitted to testify as to its identity. That is a recognized instance in which opinion evidence may be received. My attention has not been directed to any case in which opinion evidence of the character that is called for here has been admitted in evidence or has been held to be competent. It appears to me to be clearly incompetent. It is perfectly competent to show the characteristics of the individual, his attainments, his education, his style and manner of writing by witnesses who are familiar with it, but when you come to their inference from those character-
57 istics and from that amount of education it appears to me that the inference is for the jury. It is not a matter for the expression of an opinion by an ordinary witness. This question appears to me to trespass upon the function of the jury. I think the objection should be sustained.

Mr. WILSON: We will reserve an exception.

The COURT: That does not prevent an inquiry into Judge Holt's characteristics. I think that would be competent upon the cross-examination of this witness.

And thereupon the caveatees rested.

58 Thereupon the caveators, to maintain the issues upon their part, offered in evidence the deposition of JOHN JUDSON BARCLAY, tending to prove that said deponent knew the testator intimately from 1857 to 1866 and at intervals thereafter until the time of his death, and that he had last seen him in November, 1893, when he was in impaired health and in a darkened room, and said deponent, in his said deposition, testified as follows:

"5 Q. Please state whether or not at the time you saw Judge Holt in November, 1893—if you shall state that you did see him at said time—Judge Holt had any conversation with you in regard to the disposition by him of his property and estate; and, if you did, please state in full just what that conversation was and all that was said by Judge Holt, if anything, in regard to that subject."

To which interrogatory the caveatees objected on the ground that evidence of alleged conversations with or declarations by the testator referred to in said interrogatory in regard to the disposition by him of his property and estate were inadmissible either to impeach the execution by him of the will of February 7, 1873, or to prove the revocation of said will.

But the court overruled the said objection and permitted the answer of the deponent to be read in evidence to the jury as follows:

"A. In our conversation he referred most touchingly to my deceased sister, Mrs. Sarah Barclay Johnson, and made many kind inquiries in regard to my aged mother, who had also been his warm personal friend for many years. In this connection he re-
59 marked, I have made my will and have made provision for her to receive some pictures, etc., which my sister had painted for him, as well as an ambrotype or photograph of herself, which he highly prized and wished my mother to possess."

2nd Ex.

To which ruling of the court and to the admission of which answer in evidence the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

And thereupon the caveators, further to maintain the issues on their part, produced as a witness on their behalf THOMAS F. BARR, who gave testimony tending to prove that he became acquainted with the testator in April, 1865, when the latter was judge advocate general of the U. S. army, at which time the witness was ordered to report to him for duty; that he remained on duty with him, with an interval of four months, until 1872, having almost daily opportunities of seeing his manuscript and signature, and that he had received some letters from him after 1872; that, in his opinion, testator did not write the will in controversy; that the handwriting is in some respects similar, but, as a whole, entirely unfamiliar and different from any writing of his witness ever saw; that the signature is a very close resemblance; that testator was very particular in punctuation, using a full share of commas; that witness had great respect for his abilities as a lawyer, and he undoubtedly knew that the term "inherit" did not apply to a person taking under a will; that he had the clearest power of expression and was the finest rhetorician witness ever met; that witness knew the caveatee

Luke Devlin quite well, first as an enlisted soldier, then as a
60 messenger, and afterwards as a civilian clerk of the first class; that the relations of the testator were the usual relations between an officer and a messenger; that witness can say nothing unfavorable of said Devlin while under witness' observation.

And thereupon the said witness was interrogated on behalf of the caveators and answered as follows:

"From your observation of him, what was his manner towards men in such situations as Gen. Grant and Gen. Sherman?

Mr. DARLINGTON: I object to the question.

Mr. WORTHINGTON: I am now asking for his characteristics and not for his opinion.

Mr. DARLINGTON: It is utterly irrelevant and immaterial, and these would be sufficient grounds for the objection if there were not a dozen others.

The COURT: How is that material?

Mr. WORTHINGTON: It is material on the ground I have just stated—that it is not likely that anybody, especially a man of Gen. Holt's characteristics and deference towards his superiors, would have asked them to become witnesses to his will. Your honor knows, and we all know, that it necessitated their coming down to the probate court and being examined as witnesses, in the first place, when the will was tendered for probate, even if there was no objection to it. If a controversy arose, they would have to come into court and be examined and cross-examined. I do not know how it may strike your honor or the jury, but it does strike us as a very remarkable and unusual thing that Judge Holt should have selected such
61 witnesses, and that, along with the other surrounding circumstances, this is one circumstance which should go to the jury on the question of whether this will is a forgery or not.

(After full argument the court said:)

The COURT: It seems to me that the characteristics of the testator may be material on several questions that may arise during the progress of this trial and in the argument to the jury, and that these characteristics are therefore material. It is possible that different inferences may be drawn from the testimony that may be given in answer to such a question, but that would not of itself indicate the impropriety of allowing the question to be put and answered. While the question appears to be aimed at circumstances that may be remote, and that in themselves have very little weight, yet I cannot say at the present time that these circumstances may not be material. I will overrule the objection.

Mr. DARLINGTON: We will save the point.

By Mr. WORTHINGTON:

Q. Now, Colonel, will you state, from your personal observation, what were the characteristics of Judge Holt when you were associated with him in the sixties and early in the seventies as regards his treatment of his superior officers, such as Gen. Sherman and President Grant?

A. He was a man of retiring modesty and great refinement of feeling. So far as his treatment of his superiors was concerned, I saw him but seldom in their presence. On New Year's day, when the officers of the army stationed in the city make their official visit to the President, I recall having been there with him on at least one occasion."

62 *3rd Ex.*

To which ruling of the court in overruling the objection to the said interrogatory and permitting the witness to answer the same the caveatees then and there duly excepted, on the ground that the same was irrelevant and immaterial, and that the said testimony was incompetent for the purpose for which the same was professedly offered; but the court overruled the said objection and admitted said evidence; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

Upon cross-examination said witness testified that he had never discussed with Joseph Holt the meaning of the word "inherit" nor any question of the common law; that he could not swear the signature was not genuine except when added to such a document.

63 Thereupon the caveators further produced as a witness on their behalf HORATIO KING, who testified that he knew testator from 1859 to the time of his death, was acquainted with his handwriting, and corresponded with him frequently from 1863 to 1888, and that in his opinion the handwriting of the will was not that of the testator, though he could not say the signature was not the testator's if on a letter to witness.

64 The caveators produced as a witness on their behalf EMILY EDSON BRIGGS, who testified that she became acquainted with testator during the second month of the administration of President Andrew Johnson and corresponded with him and visited him frequently before his death, and that in her opinion neither the
65 text nor the signature of the will are in testator's handwriting.

Thereupon the said witness was further interrogated on behalf of the caveators, and testified as follows:

Q. Were you acquainted with any of the Throckmortons—Major Throckmorton or Mrs. Throckmorton, the major's wife?

A. I have known them in years *apst*, but not intimately.

Q. What have you ever observed as to Judge Holt's treatment of either of them, and what, if anything, have you heard him say in respect of them or either of them?

Mr. DARLINGTON: I object to that unless the time is fixed either anterior to the date of the will or contemporaneously with it. What he may have said or thought about them in years after the making of the will would throw no light upon the question of its genuineness.

Mr. WORTHINGTON: We are offering this both upon the question of the genuineness of the will and upon the question of revocation.

* * * * * * *

Mr. WORTHINGTON: I presume we might as well go into this question now, if your honor cares to hear from us on the subject. We contend that this evidence is admissible upon two grounds: First, that it is competent as evidence of the declaration of the testator with reference to his will and the distribution of his property as tending to show his relations both with the persons named in his will and those who would come under the law, take his property, if he had died intestate, and we submit that these declarations are competent, whether they were made before, at the time of, or after the date of the will.

66 Mr. DARLINGTON: Only the last proposition is in dispute. And after extended argument—

The COURT: Mr. Darlington, do you claim that this section of the law on page 562 of Abert's Compilation, taken from 29 Charles II, relating to the alteration or changing of any will of personalty, is exclusive, and that a will of personal property cannot be revoked in the manner provided with relation to real estate?

Mr. DARLINGTON: No, sir; I do not claim that. My claim about that is, if this testimony were of express declarations of the testator that he meant to change his will to the detriment of these parties it could not be received, and, *a fortiori*, that mere declarations of how he felt cannot be received.

The COURT: This provision to which reference has just been made and is relied upon by counsel for the caveatees in argument appears to me to have reference solely—and I think that is conceded now, as I understand Mr. Darlington—to a revocation of a will of personalty in a certain way. That provision is:

"No such will shall be repealed nor shall any clause, devise, or bequest contained in said will be changed by any words or word of mouth only except the same be in the life of the testator committed to writing," &c.

The object of this testimony, as I understand it, which is sought to be elicited by a question put to the witness, to which objection has been made, and which has brought forth this argument, is to adduce such circumstances as will not only indicate that it

67 was the purpose of testator to revoke this will, if the will was ever made by him, but also, by showing the relations of the parties, to indicate that it was not his intention at the time of his decease that his property should go in this way. It appears to me to be clear and beyond dispute that if this will in its present condition had been found in the possession of the testator there would not only be a presumption of fact that this burning and mutilation was done by him with intent to revoke the will, but that evidence in aid of that presumption would be received in behalf of those who contest the will, and that evidence as against that presumption would be received in behalf of the caveatees, the propounders of the will.

So if the will had disappeared, if proof had been given that such

an instrument had been executed during the lifetime of the testator and it was not found after his death, the presumption would arise of revocation by him. In aid of that presumption this class of evidence would be received both *pro* and *con*. If the instrument had turned up after his death, mutilated in this form, in the hands of some third party, then the presumption would be that the testator had not mutilated it or directed it to be mutilated, and that this intention of revocation had not existed and did not exist at the time of his death.

This situation is unique. It is conceded that the presumption is that the will was in the possession and custody of the testator at the time of his death, but it is not conceded that at that time it was in its present condition. There is no evidence to indicate that it was found in the possession or custody of the testator or among his papers after his death, but it turns up in its present condi-
68 tion in some peculiar manner, unaccounted for, coming from some unknown source, transmitted anonymously to the register of wills, its possession after the death of the testator totally unaccounted for. There can be no presumption that some third person mutilated it, and I think there can be no presumption that it was mutilated by the testator.

Certainly, unless it appears that this will came from some other source than from some one who had picked up the testator's papers, if it does not appear that it came from the custody of some one who would have some interest in mutilating it, it does not appear to me that there can be any possible presumption that it was mutilated by some third party.

In the absence of presumption either way, where are we left? Undoubtedly this burning and tearing off of the seal, the separation of the different portions of the paper, was done by some one with some intent. In the absence of direct proof as to where this will came from, and with the intimations that no one knows where it did come from, in order to attain the ends of justice it seems to me all evidence should be received that would tend to throw any light upon this whole matter. Evidence of the declarations of the testator that would be either in favor of the will and its provisions or against it, evidence of his relations with the beneficiaries under the will or with his family, who would be his heirs-at-law; evidence of any declarations that would indicate any purpose that he had with reference to the will, must be received in aid of these circumstances that here is an instrument which is alleged to be the last will
69 and testament of Judge Holt, as to which evidence has been offered, which is produced in this mutilated condition. There ought to be some way of explaining it. These circumstances being admissible in evidence under other conditions, where a will turns up in a mutilated condition in the possession of the testator or where it is lost, and such evidence being competent, I think, where it turns up in the possession of a third party in a mutilated condition, both *pro* and *con.*, it seems to me it must be competent in this situation and under these peculiar circumstances.

I therefore overrule the objection.

Mr. DARLINGTON: I reserve an exception.

I also object on the ground that the question relates not to any beneficiary of the will, but to the whole family of the beneficiary, the father and mother. I submit that would not be competent.

By Mr. WILSON:

Q. State whether or not you at any time had any conversation with Judge Holt in which the Throckmortons were mentioned; and, if so, state as nearly as you can when it was and what occurred.

Mr. DARLINGTON: When we adjourned yesterday the question was pending whether or not that inquiry should be confined to the beneficiary under this will or whether it should extend to the Throckmortons generally. I submit that it is incompetent to go beyond at least the persons mentioned in the will.

The WITNESS: I have only six words to answer. Six words includes it all.

70 Q. Can you tell us about the time of this conversation?

A. As near as I can remember it, it was some time in 1881. I think so, but I will not give dates positively, because only events stick in my mind, but not dates, but as near as I can recall——

Q. Now state what the conversation between you and him was.

Mr. DARLINGTON: One moment; we have that question pending.

The COURT: First, to whom did it relate?

Mr. DARLINGTON: The Throckmortons, the question is.

Mr. WILSON: The Throckmorton family.

The COURT: I asked merely that Mr. Darlington might have the benefit of his objection. I am prepared to rule that the conversation if it related to Major Throckmorton or Mrs. Throckmorton or his daughter is admissible.

Mr. WILSON: That is, as I understand it, what it relates to.

The COURT: Do you except?

Mr. DARLINGTON: Yes, sir; I would like to have the grounds of my objection stated under the rule. I object on the ground that it is not competent to prove revocation at all by mere proof of changed relations or the sentiments of the testator towards the parties after the will is made. I object, secondly, on the ground that testimony as to any change of sentiment or feeling upon the part of the testator towards any other than the beneficiary of the will would not be evidence which ought to go to the jury as a basis for

71 inferring or presuming revocation.

Mr. WORTHINGTON: I would like to have your honor understand that we are not asking at this time for any ruling as to whether declarations concerning Major Throckmorton would be admissible after his daughter became of age, but the date fixed by the witness for this conversation is several years before Miss Throckmorton became of age, for she gave us her birthday herself, and it was at a time after Gen. Holt had died, when the one-half of his estate would have gone into the hands of Major Throckmorton as a trustee for his daughter.

The COURT: It appears to me that if the evidence is competent as to the beneficiary—if it relates exclusively to her—then if it relates to the family, or is more immediately directed to the father or mother, yet it may remotely affect the beneficiary, and the objection then would go merely to the weight of the evidence. That is a question for the jury.

Mr. DARLINGTON: My objection is that it would be too remote for that purpose. We reserve the exception.

By Mr. WILSON:

Q. Now you may state just what occurred between you and Judge Holt in relation to the Throckmortons—what you said and what he said.

A. Well, I simply asked a question. I cannot remember what I asked—my own question—because his answer made such a deep impression on me—upon my mind—that it excluded everything else. I simply, I think, inquired after the health of the Throckmortons, or perhaps I might have said, "Are they in town?" 72 or something of that nature, and he simply—he was standing at the time I was asking the question—and he simply turned upon me with such an air and such a determination and said, "I do not know the Throckmortons," and that was the only time in my life that I ever heard him mention the name of Throckmorton. We never had any conversation—we never gossiped—and that showed me that I must not speak the name of Throckmorton.

4th Exc.

To the admission of which evidence the caveatees, by their counsel, objected upon the ground above set forth; but the court overruled said objection and admitted the same; to which ruling of the court and the evidence so admitted the caveatees then and there duly excepted, and said exception was noted at the time on the minutes of the court.

Thereupon the said witness was further interrogated and testified as follows:

"Q. If at any time after that you were with him when you met Major Throckmorton, or you and he met Major Throckmorton, state when that was and where it was.

A. It was at a levee at the White House. As near as I can remember it was—I cannot, as I said before, pretend to give dates. I only remember the incident, and I remember that Major Throckmorton came before us, because——

Q. State how you and Judge Holt were.

A. I was on Judge Holt's arm. He had asked me if I would go to the President's levee with him, and I had his arm. Major Throckmorton came up and shook hands with me and turned to shake hands with the Judge, and he turned himself around so that he turned his back to the Judge.

Q. Turned his back to whom?

73 A. I mean he turned his back to the Major. I was so frightened I had to sit down. He turned his back and never took his hand, but left the Major with his hadn extended, or it dropped very suddenly, and I was so frightened I had to sit down. I was so astounded—so astonished—and that made the impression upon my mind. That is the only way I know anything of his relations with the Throckmortons."

Said witness further testified that the incident in question occurred, according to her best recollection, during the administration of President Arthur and near the close of his administration.

5th Exc.

To which testimony the caveatees objected on the ground that the same was incompetent upon the question of the genuineness of the will because long subsequent in date thereto, and that it was incompetent upon the question of revocation for the reason that the revocation of a will cannot be shown or inferred from testimony of such character; but the court overruled said objection and admitted the testimony; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

On cross-examination said witness further testified that she didn't remember the exact question in reply to which the testator said he did not know the Throckmortons; that the question may have been, "How is Mrs. Throckmorton?" that her knowledge of the Throckmortons and their relations to the testator was only through Mrs. Throckmorton, Sr., and that she asked about their health because she knew the elder Mrs. Throckmorton was acquainted with the testator.

On cross-examination the witness stated several particulars in which she was of opinion that the letters in the will differed from Judge Holt's writing, but said she judged more from the general appearance than from details; and upon redirect examination, against the caveatees' objection and subject to their exception, she further testified that she did not form her opinion as to whether Judge Holt wrote the paper from the mere handwriting alone, but that it was the composition.

74 Said witness was further interrogated and testified as follows:

Q. Did you at that time have any talk with Judge Holt in respect of wills?

A. I did.

Q. Tell us what that was and when it occurred. First tell us where it was.

A. It was at his own house. I went over there. I was very much startled at the newspaper report that Mr. Tilden's will, who I supposed was the greatest lawyer in the country, could be broken, and it so stoood upon my mind that I went over to ask the Judge about

my own will. It is very hard to remember exactly, as I feel I must under oath——

Q. Give the conversation as nearly as you can.

A. As nearly as I can?

Q. That is all we expect.

Mr. DARLINGTON: I may have to object to this, but until I hear the answer I do not know what it is. I want to reserve the right to object.

Mr. WILSON: You can reserve all the rights.

By Mr. WILSON:

Q. Now, go on, Mrs. Briggs.

A. I asked him if he thought he could make a will that could not be broken, like Mr. Tilden's, and I remember——

Mr. DARLINGTON: I object to any answer to that question. It is purely argumentative.

A. Well, I cannot remember——

Mr. DARLINGTON: It is immaterial and collateral.

Mr. WORTHINGTON: It is only preliminary to indicating his own testamentary disposition.

75 Mr. WILSON: Just how it came about.

The COURT: What answer did he give?

Q. What did he say?

A. Well, he first told me that if I was going to make a disposition of any piece of my property to do it before I passed away. Then I would be sure; it would be done and be permanent. "But," he said, "in my own case my nephew, my brother's son, will attend to my affairs and I know it will be done all right." I know before the conversation ended he said "Washington." I did not know his people. I did not know Washington Holt, but he said, "He will attend to my affairs and I know it will be all right."

Q. I wish you would state as nearly as you can the date of that conversation.

A. About the time that it appeared in the newspapers that Mr. Tilden's will would be or had been broken.

Mr. DARLINGTON: Can we agree when that was?

Mr. WORTHINGTON: We can get at that.

Mr. DARLINGTON: He died in 1886.

Mr. WORTHINGTON: He did die in 1886?

Mr. DARLINGTON: Yes; a year after Cleveland's first inauguration.

Mr. WILSON: Then the contest over his will was subsequent to that.

Mr. WORTHINGTON: It was in litigation for a good while, and the court of appeals did not finally decide on it until several years after his death.

Mr. WILSON: That is a date that we can fix.

It is conceded by counsel that the court in special term, in New

York, declared in favor of the validity of Mr. Tilden's will in October, 1888; that the court in general term set aside this judgment in November, 1888, and declared Mr. Tilden's will invalid, and this latter judgment was affirmed by the New York court of appeals in 1891.

76 Mr. DARLINGTON: I object to the testimony on this point on the ground that if it is offered for the purpose of proving the contents of a lost will the factum of such a will cannot be proved by declarations of the testator. In the second place, the legal presumption is that the will was revoked if not found, and if found the will itself must be produced. Parol declarations of this character are inadmissible as a basis for proving revocation.

The COURT: The instrument that has been offered for probate and that is in controversy here is, as I remarked yesterday and as every one has noticed, a most peculiar instrument in many particulars. It has been either cut or torn apart. If it ever had a seal, that seal has been removed. It has been burned in spots and the edges have been burned, and it is admitted that the presumption is not that it was in this condition, but in the possession of the testator at the time of his death. It may have been in this condition. It appears to me this evidence is competent for the purpose of indicating if this will ever did have an honest existence (which is a question here, one of the questions); that it was revoked by cancellation, obliteration, or burning, and that such act was the act of the testator. It does not directly show it, but it is a circumstance of which I think the caveators are entitled to have the benefit.

Mr. DARLINGTON: If this testimony tends to prove anything, it would be that there was a later will, in which Washington Holt was named as executor. Death without a will would not leave the affairs of Judge Holt in the hands of Washington Holt for administration.

77 The COURT: No.

Mr. DARLINGTON: The tendency of this testimony, if it proves anything at all, is to prove that there was a later will, in which Washington Holt was executor, and the presumption from the non-production of this later will is that, if it ever existed, it has been revoked. It seems to me this is incompetent.

The COURT: The evidence has not yet disclosed who the next of kin are. If Washington Holt was the nearest relative, the nearest male relative, he would have the right to administer, would he not?

Mr. DARLINGTON: There has been no evidence upon the point, but in the opening statement for the caveators, the statements made in which are evidence, it is stated that he had three brothers and a sister.

Mr. WORTHINGTON: It was stated that he left two brothers and a sister; that Washington Holt was the only child who survived one of those brothers, and who would, if Joseph Holt died intestate, be entitled to one-third of his estate; but the other two-thirds would, as to one of them, be divided into two parts for the two children of a sister, and the remaining third divided into a number of parts among several daughters and sons of the other brother.

The COURT: No brothers and sisters?

Mr. WORTHINGTON: No; no brothers and sisters. Mr. Washington Holt, it will appear, stood in as near relation to Judge Holt as anybody living at the time of his death and for a great many years before. In other words, his heirs were nephews and nieces,
78 and Washington Holt was one of his nephews.

Mr. DARLINGTON: But this distinguished, exact, and remarkable lawyer, as Judge Holt is described to have been, must have known that one nephew had no precedence over another, and such a remark could only have meant that there was a will existing in which he was executor.

Mr. WORTHINGTON: Yes; that is our claim.

Mr. DARLINGTON: And the legal presumption of its non production is that it was revoked, so that this evidence would not tend to prove anything and would not be admissible here.

The COURT: It would have some tendency to prove that he thought this will, if it ever existed, had been revoked, or it might tend to prove——

Mr. WORTHINGTON: My friend prefaced his objection by saying that if this testimony was offered for such and such a purpose it was incompetent, etc. We would like to have it understood that we offer it for both purposes—both on the question of forgery and on the question of revocation. If it is competent for either purpose, of course, it must go in now, and then any question as to its effect would have to be raised on the instructions.

Mr. DARLINGTON: I submit also that it is not competent on the other ground, the question of forgery.

* * * * * * *

The COURT: The objection is overruled.

Mr. DARLINGTON: We note an exception.

Mr. WORTHINGTON: It is understood that the exception is taken as though the objection were made before the question was answered.

6th Exc.

To the admission of which alleged declaration of the tes-
79 tator the caveatees objected upon the ground set forth in the foregoing excerpt of the proceedings; but the court overruled the said objection and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

Thereupon it was agreed and stipulated by counsel for the caveators, in the presence of the court, that any further testimony that might be offered on behalf of the caveators as to any declarations made by said Joseph Holt after February 7, 1873, as to his testamentary intentions should be deemed to have been admitted subject to the objection and exception of the counsel for the caveatees upon the grounds set forth in their exception last noted above.

Thereupon counsel for the caveators further gave evidence to the jury tending to prove that between the years 1884 and 1893 said

Joseph Holt on several occasions told Washington D. Holt that he, Joseph Holt, had made him, said Washington Holt, his executor; that said Joseph Holt during the same period on several occasions informed said Mary Holt and her mother, Vanda Holt, that they would be much better off after his death; that they would then go to Europe; that said Mary Holt must become proficient in French, so that while in Europe she could act as their interpreter; that during the same period he told the servants in his house on divers occasions that said Washington D. Holt would have charge of his affairs after his death, and about three months before his death he told Martha Scott, one of said servants, that when he died he wanted a certain flag which was in a trunk upstairs wrapped around his body, and said he told her about the flag because his funeral
80 was all in his will and his will would not come out until after he was buried, and that that was why he told her about the flag.

The witness Emily Briggs further testified, in reply to questions addressed to her on behalf of the caveators, that she was a journalist by profession and had made literature her business in life; that she had received instruction from said Joseph Holt in the line of composition in the English language; that she had gone to him and asked his advice about certain paragraphs in the series of articles written by her, because she had been informed he was a master of the English language.

Thereupon said witness Briggs was further examined on behalf of the caveators and testified as follows:

Q. In the opinion you have expressed as to whether Judge Holt wrote this will or this paper which is called his will, do you form your opinion, in any respect, upon any matter except the mere handwriting?

A. Indeed I do; it was the composition.

Mr. DARLINGTON: I object.

The WITNESS: He was my master—my teacher.

Mr. WORTHINGTON: This witness has testified that she has, in a large measure, made literature her business in life, and that she took lessons, in the line of composing in the English lan-
81 guage, from Judge Holt and thereby became particularly well qualified to express an opinion as to whether that paper is in his writing or not.

Mr. DARLINGTON: Do you say that she took lessons from him?

Mr. WORTHINGTON: She did; she went to him for the purpose of being taught.

The WITNESS: That is just what I did. When I wrote the Andy Johnson letters, that went from Maine to California, I knew I must do it right. I cannot tell you the stress I was under in writing these articles. I went to Judge Holt and asked him about certain paragraphs, to have him tell me if I made a mistake, because I was the only woman in this country who was doing that work and I felt that I represented my whole sex. I went to him because I was

told by Ben. Perly Poor and my husband that he was a master of the English language and that he would teach me to write.

Mr. DARLINGTON: I object to all this.

Mr. WORTHINGTON: She has already testified that she made writing her business, and that she went to Judge Holt to acquire his style and to get information from him about how to write. I submit that she is particularly well qualified to express an opinion when a document of this kind turns up after his death as to whether he wrote it.

By Mr. WORTHINGTON:

Q. Let me ask you if you recollect anything as to his habits regarding punctuation.

A. I only know that he was very particular about every sentence. He told me how to dress an idea so that it would stand out,
82 and I got the name of being a fine writer from the knowledge I received from him; he taught me.

Mr. WORTHINGTON: It does seem to us that the opinion of such a witness ought not to be excluded from the jury.

Mr. DARLINGTON: Of course, the grounds of objection are that the question of opinion evidence is based upon well-established principles, and that the opinion of people as to phraseology, the construction of sentences, and composition has never yet been recognized as a subject upon which courts could receive the opinions of witnesses.

The COURT: Do you know whether the question has ever arisen in any reported case?

Mr. DARLINGTON: I do not. I imagine this is the first time such testimony has been offered.

The COURT: Since my ruling the other day I have been trying to get further light upon this subject. I think it sufficiently interesting to have it reargued.

And thereupon the foregoing objection was fully argued by both counsel for the caveatees and caveators.

Pending the argument and before the ruling of the court counsel for the caveators said:

(Mr. WORTHINGTON:) We are not now, whatever may come hereafter, asking your honor to rule that anybody may give an opinion as to whether this is a production by Judge Holt wholly from his style or as a grammatical composition. We are asking that this witness may be allowed to say that her opinion is based both upon the handwriting, the composition, and all there is in it.

Mr. DARLINGTON: If the one thing is not competent can the other make it so?

83 Mr. WORTHINGTON: If the opinion of this witness is, as she has stated, based partly upon handwriting and partly upon the composition and style, then, according to my brother's argument, it must be excluded entirely, because she cannot separate the thing in her own mind.

After further argument—

The COURT: Mr. Worthington, as I understood, suggested a limitation to the inquiry, so that the opinion of the witness would be confined to these two elements—the composition and the handwriting.

Mr. DARLINGTON: I move to strike out so much of the last answer of the witness as relates to opinion of composition.

The COURT: The question is a very interesting one. It is novel, but, on the whole, I have reached the conclusion that I will admit it to the extent that has been indicated.

Mr. DARLINGTON: Do you offer this lady as an expert or otherwise?

Mr. WORTHINGTON: Not as an expert in the proper sense, but simply as a person may testify as to handwriting from being acquainted with it, and also as to the other matter.

Mr. DARLINGTON: I make the motion on the ground that the witness' testimony as to the opinion of style of this document and the likelihood that it would have been written by Judge Holt as a matter of rhetoric or composition is conjectural, remote, intangi-
84 ble, and is opening up an indefinite and wide field of inquiry, too wide for judicial investigation; that it is not a class of opinion evidence admissible under the rules or principles of evidence; that, the paper being present in court, its composition and style, in so far as they are competent questions at all, are questions for the court and jury or the court or jury, and not for the opinion of a witness; that such lines of testimony are dangerous, against public policy, take away the security afforded by the statute to testators and those interested in their wills, and render it possible to overturn any will by testimony of a vague, indefinite, and irrefutable character.

7th Exc.

To which evidence the caveatees, by their counsel, objected on the grounds above set forth; but the court overruled said objection and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

And the said witness, under the like objection of the caveatees and subject to their said exception, further testified that her opinion as to the genuineness of the said paper-writing was based both upon the handwriting and the composition, and that her reasons for believing the will not genuine were "more the composition, as well as the writing."

Said witness further testified, on recross-examination, that the literary productions of the testator that she had studied were his Charleston speech, made in 1865, his letters to her, and his
85 conversations with her; that his principal characteristic in style of composition was forcibleness; that he had a clear, concise, simple, and forcible manner—not verbose; that he used few superfluous words in his letters to her—never a word that the sentence could be made complete without.

The caveators further produced as a witness in their behalf WILLIAM WINTHROP, who testified that he practiced law from 1854 to 1861, since which time he had been connected with the War Department; he had been an officer in the Army of the United States and for many years an assistant judge advocate; that he served under the testator, who was judge advocate general, from 1864 until the testator's retirement, which occurred in September, 1875; that he assisted Judge Holt in preparing contracts, deeds, leases, acts of Congress, and annual reports to Congress, and had seen his style in other papers, like addresses that had been published; that he saw him sign his name frequently and saw his handwriting in official papers and a limited correspondence; that he regarded him as an able lawyer, not only as to common-law practice, but as a constitutional lawyer, which witness thinks was his strong point; that Luke Devlin was first a messenger in the judge advocate general's office and then a clerk, who copied Judge Holt's opinions; that his relations with Judge Holt were very friendly and kindly, but his relations were those of a messenger, and witness saw no indication of social or business relations between them; that while the will in controversy bears considerable resemblance to Judge Holt's handwriting, witness' decided impression is that it is not his handwriting; that, speaking of the handwriting, irrespective of any other consideration, his decided impression is he never wrote it.

And thereupon the witness was interrogated and testified as follows:

Q. I will ask you, speaking from the handwriting and the composition, style, and punctuation of the whole paper as
86 you see it there, what is your opinion as to whether or not Gen. Holt was the producer of that document?

A. I should say that he was not.

Mr. DARLINGTON: I suppose it is understood that our objection applies all the way through. I suppose it is not necessary to reiterate it each time.

The COURT: You object to any question or answer, I suppose, where either the question or answer is addressed, in whole or in part, to an opinion based upon composition, etc., instead of handwriting?

Mr. DARLINGTON: Yes, sir; on the ground that such an opinion is conjectural and misleading, and also upon the other grounds more elaborately specified in the argument on the questions previously objected to.

Mr. WORTHINGTON: Your honor used the expression "in whole or in part." I have not yet asked any witness to express any opinion on this document based on composition alone.

The COURT: So far you have not.

Mr. WORTHINGTON: I have asked him to express his opinion on the handwriting alone and then on the handwriting and composition taken together.

Mr. DARLINGTON: I object to any question which embraces in it the question of phraseology or composition.

Mr. WILSON: Let it be understood that whenever such a question is asked their objection is noted to it.

8th Exc.

To the admission of which testimony the caveatees objected upon the grounds set forth; but the court overruled said objection and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time on the minutes of the court.

87 Said witness further testified that he should be in very great doubt as to the genuineness of the signature and would not like to say more positively; that said Joseph Holt's style was a little formal, florid, and flowery; that he used no superfluous words, but illustrated a good deal.

Thereupon said witness was further interrogated on behalf of the caveatees, and testified as follows:

"Q. Let me call your attention to the use of the word 'inherit' in that paper, in the middle paragraph. From your knowledge of Gen. Holt's characteristics and his way of expressing himself, what do you think as to that being his expression?"

9th Exc.

To which interrogatory the caveatees then and there objected upon the same grounds of objection as are specifically set forth in the foregoing 7th and 8th exceptions; but the court overruled
88 the said objections and permitted the witness to answer that he did not think the testator would use that expression.

To which ruling and admission of evidence the caveatees objected; but the court overruled said objection and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

Said witness further identified as in testator's handwriting an earlier will of the testator, dated the 9th day of April, 1848, which will was thereupon offered in evidence by counsel for the caveatees and is in the words and figures following:

"I, Joseph Holt, a citizen of Louisville, State of Kentucky, do make and publish this my last will and testament, hereby revoking all others, heretofore made:

Item 1. To my beloved mother, I give the sum of *five thousand* dollars—

"2. To my sister Elizabeth Sterett I give the sum of seven thousand dollars, to be by her enjoyed and held absolutely in her own
89 right, exclusive of & free from the control of all & every person—And I request my friend & relative Wm. Sterett, (who by operation of law will be the trustee under the trust hereby created) to see that the interest upon this sum is punctually paid semi-annually to my said sister—

"3. To my brother James I. Holt, I give the sum of thirty-five hundred dollars—I direct, however, that my executor shall pay out of this, any debt or debts which may yet remain due by the late firm of J. J. Holt & Co.—and that the balance of the sum hereby bequeathed, shall then be paid to my said brother—

"4. To my brother Thomas Holt, I give the sum of fifteen thousand dollars—

"5. To John & Washington Holt, children of my brother Thomas, I give each the sum fifteen thousand dollars—

"6. To my brother Robert S. Holt, I give the sum of thirteen thousand dollars—

I also devise unto my said brother Robert, the house and lot owned by me in the city of Louisville, situate on Walnut street—being the same conveyed to me by Jno. J. Jacob—& for some years occupied by me as a residence—

I also give & bequeath unto my said brother Robert, all my household & kitchen furniture & wares of every kind, and my silver plate—except so far as some of the foregoing articles may be hereinafter specifically disposed of to other persons—

7—To Joseph Holt, infant son of my brother Robert, I give
90 the sum of four thousand dollars—

8—To Annie Holt, infant daughter of my brother Robert, I give the sum of fifteen hundred dollars—

9—To my brother Robert, I give the sum of fifteen hundred dollars—*in trust* that he will place the same at interest—that out of the principal & the interest thus accruing, he will pay to Miss Elizabeth Hynes, one hundred & twenty dollars per annum, for five years—(provided she shall so long live & unmarried) & and at the expiration of said five years he shall pay her the balance which shall remain of said principal sum & interest—if however she should marry before the expiration of five years from my death, then the payment of the 3d hundred & twenty dollars per annum will be continued up to her marriage & upon that event the balance of the principal & interest shall be paid to her—should she die without having married before the expiration of said five years, then the balance of said principal & interest remaining at her death shall revert and constitute a part of my estate—

10—To Cuthbert H. Bain, I give the sum of *one* thousand dollars—

11—To my aunt Rebecca Stephens, I give the sum of one thousand dollars—

12—To Miss Sally & Miss Frances Harrison, I give each the sum of five hundred dollars.

91 13—To my friends James O. Harrison & Jno. M. Chilton, I give each the sum of fifteen hundred dollars—

14. To Thomas Hicks, a little orphan boy now living in the family of my brother Thomas, I give the sum of five hundred dollars—

15 I direct that my slaves, to wit, Joshua, Richard & Sandy shall be emancipated immediately after my death—and that my executor shall pay to each of them the sum of two hundred dollars, in four semi-annual payments of fifty dollars each—the first of which shall be made immediately after their emancipation—Provided, however,

that should my executor believe that the interests of all or any of said slaves demand an earlier payment of said legacy, then he is authorized & requested to make such payment accordingly—

16. I direct that my slaves, Joanna, Julia & Louisa, shall be emancipated at the following times, when I suppose they will be each about twenty or twenty-one years of age—viz—*Joanna* in January, eighteen hundred & fifty six—*Julia* in January eighteen hundred & sixty four—& *Louisa* in January, eighteen hundred & sixty three—

17. To my brother Thomas, I give & bequeath sa-d slaves, *Joanna & Julia* until the time specified above for their emancipation—

18. To Candace, a free woman of color, & who is the
92 mother of Louisa, I give & bequeath the said Louisa until the time specified as above for her emancipation—Provided, however, that should Candace die before January, eighteen hundred & sixty three, then after her death, I give & bequeath the said Louisa to my brother Thomas, until the time aforesaid fixed for her emancipation—

19. To the said Candace, I also give the sum of fifty dollars, per annum during her life, & charge the payment of the same upon the house & lot hereinbefore devised to my brother Robert—

20. To my brother Robert, I give the further sum of four hundred & fifty dollars in trust—that is to say, one hundred & fifty dollars in trust for each of the said slaves, Joanna, Julia, & Louisa, and direct that he shall place this sum at interest, and upon the emancipation of said slaves he shall pay to each of them in succession the said hundred & fifty dollars, & the interest thereon accrued.

21. I give & bequeath my library to my brother James & Robert jointly—

22. To Miss Sarah Harrison I give the travelling dressing case which belonged to my late beloved wife, together with its contents, except so far as they may be herein otherwise disposed of—

23. To Miss Elizabeth Powell, I give & bequeath the diamond ring owned & worn by my late beloved wife.

93 24. To my friend Jno. M. Chilton I give the gold watch, which he kindly presented to me many years ago.

25. To Cuthbert H. Bain I give & devise all my title & interest in & to a tract of land situate in Crittenden County, N y, known as "Hurricane Island"—said interest being one undivided third part—

26 I also give & bequeath to the said Cuthbert a mahogany work-stand owned originally by his mother, & and by her presented to the late Mrs. Holt.

27. To my brother Robert, I give my diamond breast pin—

28. To the American Tract Society instituted in the city of New York, I give and bequeath the sum of one thousand dollars to be applied to the charitable uses and purposes of said Society—

29. To my brother Robert S. Holt, I give & bequeath the sum of two thousand dollars in trust that he will appropriate one thousand dollars of the same to the use & benefit of the orphan Asylum existing in the City of Louisville under the care and patronage of the episcopal church, and that he will appropriate the remaining thou-

sand to the orphan asy,um existing in said city under the care & patronage of the Roman Catholic church—

94 30—I direct the legacies hereinbefore named, to my mother, sister, brother Thomas to be paid to them in Kentucky bonds which I now hold at par—the coupons *due* at the moment of payment, to be clipped off & to constitute a part of my estate—& I advise my said relatives to retain those bonds as the most convenient & safest investment which they can make—

31—Whenever I may die, I request my executor if practicable to have my body interred beside that of my beloved wife—

32. I hereby appoint my brother Robert S. Holt of yazoo county, Mississippi, sole executor of this my last will & testament—& request that he may be permitted to qualify as such without giving the bond & surety usually required—

In testimony of the foregoing will all of which is written with my own hand, I hereunto sign my name & affix my seal this ninth day of April, 1848

(Signed) J. HOLT (SEAL.)

Said witness, upon examination of the said will, thereupon admitted that in the names "James I. Holt" and "Robert S. Holt," repeatedly occurring in said will, dashes followed the words "James" and "Robert," similar to those following "Josephine" and "Holt" in the will in controversy; that the character "&" was frequently substituted for "and;" that the words "Episcopal Church" were spelled without capitals in the will of 1848, and the word "church" with a small "c" in "Roman Catholic Church."

95 Thereupon the caveators, to further maintain the issues upon their part joined, produced as witnesses W. H. Dobson, Joseph Fought, Samuel Hodgkins, Addison A. Hosmer, Emily V. Miller, Francis G. Saxton, Arthur Schatz, Albert L. Smith, Washington D. Holt, Mary Holt, Lockie W. Iglehart, and Charles Strothers, who gave testimony tending to show that, in their opinion, the said paper-writing was not in the handwriting of said Joseph Holt, and that it was not, in the opinion of some of said witnesses, even a good imitation thereof, and the witness Hodgkins testifying that every word and letter, he was inclined to say, showed a departure from the said Holt's general handwriting, though he had not examined all the letters all the way through.

Thereupon the caveators produced as a witness on their behalf ROBERT DUTTON, who testified that he was a Star reporter; that he was present at the office of the register of wills on the day that the will reached that office and examined it; that he was in doubt whether the lower fold of the paper, containing the signature, was then separated from the upper portion of the paper or not; that he looked at it with a magnifying glass the day following and was still in doubt, not being satisfied whether it had been separated or otherwise.

FREDERICK T. SCHRADER, another witness produced on behalf of the caveators, further testified that he had examined the paper in the office of the register of wills on the 28th day of August, 1895, being the day after it reached the office of the register of wills, and concluded that the lower fold was separated.

SMITH THOMPSON, a further witness called on behalf of the caveators, testified that he was an employee of the register of wills' office for the past nine years; that he was present in the
96 office when the will in controversy was received there; that he paid particular attention to its condition when received, and distinctly observed that the lower fold was intact and had not then been severed from the body of the will; that some one raised the question whether the signatures had not been pasted to the body of the will, which led witness to examine it particularly, and he found that the paper had not been severed.

The caveators further produced as a witness on their behalf LEVI P. WRIGHT, who testified that he was register of wills for the District of Columbia when the will in controversy was received at that office; that it came in the morning's mail on the 26th day of August, 1895, sealed up in an envelope, with a piece of pasteboard enclosed with it; that the envelope contained nothing except the will and the pasteboard; that within two or three days after its arrival he had the will and envelope enclosed in a glass case for its protection and to prevent injuring from handling, and that it was not thereafter taken out of the case or frame to witness' knowledge except that witness had it photographed; that there was no change in it at the time of trial except that it had been worn considerably since he first saw it.

Said witness further testified that within a week or two after the death of the testator, which occurred in August, 1894, at the request of Washington Holt, witness went to the house of the testator and made search for a will; that he found papers scattered about somewhat, but found none of any consequence; that he searched through the bed-room and library and through his books to see if the will might not have been placed in some book, but that he found
96½ no testamentary papers of any kind; that Washington Holt stated he expected to find a will in which he was made executor, and that he would give witness $40,000 to find such a will, but that this may have been a careless remark made by Mr. Holt.

E. R. LEVY, another witness produced by the caveators, testified that he was an employee of the register of wills' office in August, 1894; that at that time and at the request of Washington Holt he searched through the house of the testator for a will; that Washington Holt offered him $5,000 to find it; that the papers had evidently been gone over before he examined them; that he saw in a grate that a considerable number of papers had been burned; that witness suggested sealing up the papers, because he saw how things were going on there, and he thought it best to do so until somebody in authority took charge.

97 Thereupon the caveators introduced the testimony of Ann C. Holt, John W. Holt, Mary Holt, Washington Holt, Mrs. Lockie Holt Iglehart, William G. Sterett, and Margaret T. Bowmer tending to prove as follows:

That Joseph Holt was born in or about the year 1807; that until the year 1856 (excepting a few years when he practiced law in Mississippi) he lived in the State of Kentucky; that he was first married in the year 1837 to Mary L. Harrison, who died in the year 1846; that in the year 1850 he married Margaret Wickliffe, who died about 1860; that there were no children by either marriage; that Joseph Holt died in the city of Washington, D. C., in August, 1894, leaving an estate of about $180,000.00; that the father of said Joseph Holt died before the war, and that his mother died in the year 1871; that at the time of her death and for many years prior thereto she was living at Holt's Bottom, in the family of Washington D. Holt; that said Joseph Holt had a brother named Robert S. Holt, who lived in Mississippi and married there in 1843 and died in 1867, leaving him surviving his widow, Ann C. Holt, who is still living; that the caveators Lockie W. Iglehart, Sarah Holt, Robert S. Holt, John W. Holt, James Holt, and Thomas Holt are the children of said Robert S. Holt and said Ann C. Holt; that said Sarah Holt was an invalid for many years in an infirmary at Philadelphia, when said Joseph Holt visited her, in the year 1868; that said Joseph Holt had another brother, named Thomas Holt, who died in the year 1876; that when said Joseph Holt died Washington D. Holt, one of the caveators in this case, was the only surviving child of said Thomas Holt; that said Joseph Holt had a sister named Elizabeth, who married William Sterett; that said William Sterett died in the year 1872; that said Elizabeth Sterett died in
98 the year 1863; that said William Sterett and said Elizabeth Sterett had two children, William G. Sterett and Margaret T. Sterett (who married William H. Bowmer), two of the caveators in this case; that said Joseph Holt had another brother, James Holt, who died in Texas in 1867, and that the caveators in this case are the only next of kin of said Joseph Holt who survived him.

And thereupon the caveators further gave to the jury testimony tending to show that prior to the war of 1861 the relations of said Joseph Holt with his mother and with all his brothers and his sister and with such of their children as were then living were as intimate and affectionate as is usual with persons standing in the same relation in which he stood to them; that during the war all of these relatives sympathized with the South; that Joseph H. Holt (a son of Robert S. Holt and Ann C. Holt, who died in 1886) was in the Confederate army during the war; that John W. Holt and Washington D. Holt, two of the caveators, were also in the Confederate service for a short time; that while during the war communication between said Joseph Holt and his relatives was infrequent, yet he had not manifested any bitterness of feeling towards any of them; that after the war and prior to the 7th day of February, 1873, he called on said Ann C. Holt and her son Joseph (who had been in

the Confederate army) when they were in Washington for a day or two and treated them kindly; that during this period between the close of the war and February 7th, 1873, said Washington D. Holt lived in the old homestead at Holt's Bottom, and that said Joseph Holt's mother lived with him; that in 1870 said Washington D. Holt married and continued to live with his wife Vanda at Holt's Bottom, where in the year 1871 there was born to
99 them a daughter, Mary; that during said period said Margaret Bowmer lived at the town of Cloverport, Ky., about six or seven miles from Holt's Bottom; that at that time the said Margaret T. Bowmer had one child, named Nellie Holt Bowmer; that on several occasions during the war and afterwards, prior to the 7th day of February, 1873, said Joseph Holt went to Kentucky and remained for several days at a time at said Holt's Bottom, visiting his mother, his brother Thomas, and his nephew, Washington D. Holt; that on these occasions or some of them Mrs. Bowmer went to Holt's Bottom to meet said Joseph Holt, and that during this entire period the relation of said Joseph Holt with all the members of said household and with Mrs. Bowmer and her family were pleasant and affectionate.

The caveators, subject to the said exception of the caveatees as to testimony of this character, gave evidence tending to prove that Thomas H. Holt, nephew of said Joseph Holt, who lived in Boston, visited him at his house on several occasions during the latter part of his life and was kindly received, and that said Joseph Holt spoke kindly of him to others after he was gone.

And, as a part of their testimony tending to show that prior to February 7, 1873, the relations between Joseph Holt and his relatives were pleasant and affectionate, the caveators gave in evidence to the jury letters written by said Joseph Holt and conceded by counsel for caveatees to be in his handwriting, as follows:

100 (To Robert S. Holt.)

WASHINGTON *Feby.* 13*th* 1867.

DEAR BROTHER—

I am in rect of your letter of the 30th ult & have no words in which to express my sorrow for the calamity which has befallen your daughter & the household that loves her so well. I do not think however there is ground for the discouragement which you seem to feel. She is young and the cause of her suffering not being a mental one will no doubt yield to treatment. Cures are under such circumstances effected. I think in the great majority of cases, & your purpose to give her the advantage of the best medical skill in the country, will I rejoice to believe, result in restoring her to permanent health.

* * * * * * *

I should be very glad to hear from you more frequently, & trust that ere long I shall have the happiness of learning of your daughter's improvement & complete restoration.

With love to sister & the family,

I am your affectionate brother,

J. HOLT.

101 WASHINGTON 15TH, 1868.

MY DEAR MOTHER.

Your letter of the 4th inst. was received a few days since & I was much gratified to learn that the remittance had reached you safely. Fearing that my letter had miscarried, I addressed you a brief note of inquiry on the subject which will no doubt soon come to hand, if it has not already done so.

My reason for asking so particularly about the landing was a fear that at the low stage of water prevailing in the summer & early fall the bank might be so steep as to render it difficult to haul up to the top a heavy block of stone or marble. Hence I thought it might possibly be advisable to land the monument at the mouth of . This, however, would be very inconvenient, and if it can be got up the bank at Stephens landing of course that is the best place for it.

I am unable to say whether Sally is still at the Asylum or has returned home. I have not heard from her or from her mother for a long time. After my visit to her, I endeavored to draw her into a correspondence with me, but did not succeed. I think it probable however if she had gone home her mother would have apprised me of it.

We are overwhelmed with the heat here. I have never known the weather more oppressive & exhausting. I hope my dear mother, that you are in a cool place to day & have nothing to make you sorrowful.

With love to yourself, & to the family, I am, as ever, your affectionate son,

J. HOLT.

102 (To Sarah Holt.)

WASHINGTON, *May 5th*, 1868.

MY DEAR NIECE.

Since my return home I have written to your mother mentioning my visit to you & my great gratification at the improvement which has taken place in your health. I hope to hear from her soon. Should you continue to grow better I trust it will not be necessary for you to remain much longer where you are. When you return you will only enjoy the society & sympathies of the loved ones at home the more from your having been so long separated from them. I am sure that the future has much happiness in store for you—you must believe this and keep your spirits cheered & hopeful.

I was so sorry that my visit to you was so long delayed & that I was obliged to return so soon. I wished to chat with you about so many things, & to drive with you into the surpassingly beautiful country which surrounds Philadelphia. I am certain that the sight of it would have made you glad. I shall avail myself of the first opportunity to see you again and then hope we will be able to enjoy a drive together.

You told me you did not read the newspapers. If agreeable to you I will send them to you occasionally & think if you read them, hey will afford you both amusement and instruction.

I must beg that you will write me soon—not a few lines, but a long letter, telling me all about yourself, & giving me the latest news you have from home.

I have a cousin in Philadelphia—Miss Mary Cash, who promised me to call and see you. If she does, I must ask that you will not refuse to make her acquaintance. She is very pleasant and kind-hearted, and if you knew her well I am sure you would like her.

Your affectionate uncle,

J. HOLT.

103 WASHINGTON *May* 2*d*, 1870.

MY DEAR MOTHER—

Having written you at some length recently, I only add a few lines at present for the purpose of enclosing the within fifty dollars, which I wish divided among the servants as follows: To Winny, $10—To Dick $10. To Joshua $10. To Sandy $5. The remaining $15 I desire to have divided among Joanna's children.

I shall be glad to hear that this remittance has reached you safely, & that you are in better health & spirits than when you last wrote me. I think of you, ever, my dear mother, & rejoice in the hope of seeing you again:

* * * * * * *

With love to the family & a heart full of love for yourself, I am as ever, my dear mother, you- affectionate son,

J. HOLT.

104 (To Mrs. Rosina Holt.)

WASHINGTON *Nov.* 15, 1870.

MY DEAR SISTER.

I send you by the express of to-day the photograph promised. I think it the best likeness that has been taken of me.

* * * * * * *

I cannot sufficiently express to you my grateful sense of the warm-hearted kindness & generous hospitality with which I was welcomed. I promised myself the pleasure of seeing you all again next summer, when I trust to have more time at my disposal than I had on the occasion of my late visit.

* * * * * * *

With love to mother & all the family, I remain,
Your affectionate brother,

J. HOLT.

105 (To Vanda Holt.)

WASHINGTON, *Nov.* 10*th*, 1871.

MY DEAR NIECE.

Your note of the 2d inst. did not reach me until this morning.

* * * * * * *

During my late visit there seemed to be continually resting on her spirit the shadow of a presentiment that we would not meet

again, when I conducted her from the table to her couch the morning I left, as she took her arm out of mine, she said quietly but sadly: "The last time." Her words were prophetic, though I could not realize them to be so at the moment.

* * * * * * *

With love to the family, I remain, your affectionate uncle.

J. HOLT.

106 WASHINGTON, *Dec.* 14*th*, 1871.

DEAR BROTHER—

I enclose you a post office order for $50 which I presume you will have no difficulty in having cashed at Cloverport. I will thank you to distribute the proceeds as follows, viz. To Joshua $10, To Winny $10. To Dick $10. To Sandy $5. The remaining $15 I wish divided among Joanna's children—you can give Dick's portion to him, either in money or in provisions, as you may deem best for his interests. Tell them that I send this to them as a Christmas gift.

Please advise the safe arrival of the enclosed.

With love to sister & the family, I remain your affectionate brother

J. HOLT.

Mr. Thomas Holt.

107 (To Mrs. Bowmer.)

WASHINGTON, *June* 24*th*, 1872.

MY DEAR NIECE.

Your kind letter of the 8th inst. was duly received, as was your subsequent telegram, saying that brother Thomas was worse & might not recover. Since then I have been anxiously awaiting further intelligence, but as yet nothing has reached me. The tone both of your letter & despatch was such as to induce fears for the worst, but as nothing has come conforming your apprehensions, I am striving to hope that the crisis has been passed in safety.

You have my heartfelt sympathy in the bereavement you have suffered from your father's death, of which I was first informed through a letter from Judge Krutcheloe. He has left you the memory of his long, active, useful & honorable life, & this you will always be able to recall with satisfaction & pride. The friendly relations between us had continued from my boyhood, without a moment's interruption, & he always had a warm place in my heart. The passing away of so many members of our family, seems to bring my own feet very near to the grave.

I have been promising myself the happiness of seeing you & yours the coming fall, but am beginning to fear that I shall be disappointed. Some engagements here, which I cannot well control, threaten now to prevent me from carrying out my original plan, which was to visit the west in September or October. I wish to see you so much, & shall certainly embrace the first opportunity to do so.

I thank you for what you say of those bright children of yours, of whom I have a most pleasant & fond remembrance. I trust you will not allow them to forget me.

With kind regards to Mr. Bowmer & love to yourself & the dear little ones, I am

Your affectionate uncle,

J. HOLT.

108 WASHINGTON, *Sept. 24th*, 1872.

DEAR BROTHER,

I am in receipt of your last letter & am glad to learn that you have been able to select a monument which pleases you & that it is so near completion. My contribution to it is enclosed in a draft on New York for $200 which I presume can be readily cashed. If it will be at all inconvenient for you to pay the remaining $50, let me know it & it shall be at once remitted. I do not make the remittance now because of a belief that it will be more agreeable to you to share in the expense of the work.

I shall not be able to leave home this fall, but hope to be in the West next summer. The time however is too far distant to be able to speak decidedly on the subject.

Please advise me of the safe arrival of this.

I have a great desire to see you all once more, & the old homestead With love to sister, I remain your affectionate brother,

J. HOLT.

Mr. Thomas Holt.

109 Thereupon LOCKIE HOLT IGLEHART, one of the caveators, called as a witness in their behalf, testified that she is a daughter of Robert S. Holt, of Mississippi, Joseph Holt's brother; that she is forty-five years of age, and is the wife of John E. Iglehart; that she has been living at Evansville, Indiana, about twenty-six years; that her mother, Ann C. Holt, lives with her there; that she, witness, has four children, Eugene, Annie, Lockie H., and Joseph H., who were born between 1875 and 1881, and that she, witness, first met her uncle, Joseph Holt, when she with her husband was on her wedding trip in 1874 in Washington. Thereupon counsel for the caveators asked the witness to state how her uncle, Joseph Holt, treated her and her husband on that occasion. To this question counsel for the caveatees objected on the ground that testimony as to the relations between the testator and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue for the reason that it threw no light on the question whether or not the testator executed the will in controversy, and that it was incompetent upon the fourth issue upon the ground that revocation could not be shown or inferred from testimony of kindly relationship between the testator and members of his family arising subsequent to the date of the will; but the court overruled the objection and admitted the testimony; to which

ruling and admission the caveatees then and there duly ex-
110 cepted, and said exception was noted at the time upon the minutes of the court; and it was thereupon agreed and stipulated between the counsel, with the concurrence of the court, that said objection applied to all testimony of a similar character thereafter offered and admitted, without encumbering the record with a repetition of said objections and the exception based thereon.

Thereupon the witness in response to the question testified that on the morning after she arrived in Washington with her husband on their wedding trip in 1874 her uncle, Joseph Holt, called with his carriage and took them to his home, where they remained about five days; that he gave up his business and devoted his time to entertaining them very nicely, and went to his office only once during that time; that he was just as affectionate as any uncle could be; that he would sometimes, when witness would leave the room, say he disliked her to get out of his sight; that she reminded him of her father; that during that five days he gave her a handsome set of jewelry as a wedding present; that nothing of an unpleasant nature occurred at that time between witness and her uncle, but that he was just as kind as it was possible for him to be.

Mrs. Iglehart further testified (subject to the objection and exception of the caveatees in accordance with the above stipulation) that from 1874 until her uncle, Joseph Holt, died the relations between her and her family on the one hand and said Joseph Holt on the other continued to be of the most affectionate nature; that he visited her at her home in Evansville for a day or two in 1875 or 1876 on his way to Hot Springs, Arkansas, and that she met him on sev-
eral subsequent occasions in Washington, when for a few
111 days at a time he entertained her at his home: that from 1873 she kept up a correspondence with said Joseph Holt until a few years before his death, when, on account of failure of his eyesight, he had to conduct his correspondence through his servants, and that she felt a delicacy about having her letters seen by others and did not write so often, and that she had preserved a number of the letters which she had received from Judge Holt during said period. Whereupon said caveators offered said letters in evidence, and (subject to the objection and exception of the caveatees in pursuance of the above stipulation) they were read in evidence to the jury as follows:

112 (To Mrs. Iglehart.)*

WASHINGTON, *June 13th*, 1873.

MY DEAR NIECE.

I thank you sincerely for your kind letter of the 9th inst. & for the photographs which you were so good as to enclose. Yours especially seems charmingly taken & I shall prize and cherish them both fondly. It would afford me much gratification to see you all, but circumstanced as I am, when I go West, I am so hurried & my time so limited, that for the present, the prospect of my being able

[*.Words enclosed in parentheses erased by pencil in copy.]

to make you a visit is not very encouraging. I have not myself heard from brother Thomas' family for a good while my last news was to the effect that his health was not at all good, & that he & sister Rosina were living alone on the family, his son having gone to Cloverport & engaged in some kind of business there.

* * * * * * *

With affectionate regards to your mother, the family & yourself,

I remain your uncle,

J. HOLT.

113 (To Mrs. Iglehart.) *

WASHINGTON, *July 3d*, 1874.

MY DEAR NIECE.

I thank you for your very welcome letter of the 27th ult. & for the agreeable & interesting news of your family which it brought me, especially was delighted to hear what you say of the affectionate devotion of your brothers and of their successful industry & enterprise. I am sure they well deserve all the commendation you have bestowed upon them, & in the future I doubt not they will give the same generous & loving support to their mother & family, as in the past. They have their father's spirit, which was faithful & fervent in the performance of every duty. Greatly do I rejoice in their success & in the bright future, which I love to believe awaits them.

* * * * * * *

With loving regard to your mother & family, I remain,

Your affectionate Uncle,

J. HOLT.

114 (To Mrs. Iglehart.) *

WASHINGTON *Oct. 7th* 1874.

MY DEAR NIECE.

I am in receipt of your letter of the 3d inst. & hasten to congratulate you on the prospect of happiness which is opening before you. May all your dreams—bright as I am sure they are—be fully realised.

My present expectation is to be in Washington about the time you mention, & I shall be much gratified to see you both. Please let me know of your arrival without delay. My address is 236 New Jersey Avenue, Capitol Hill.

I thank you sincerely for the news communicated in regard to the different members of your family.

With affectionate regard to your mother, I remain your sincerely attached Uncle,

J. HOLT.

[* Words enclosed in parentheses erased by pencil in copy.]

115 (To Mrs. Iglehart.)*

WASHINGTON *Jany 5th*, 1875.

MY DEAR NIECE.

* * * * * * *

I have been very lonely since you left & have wished so often that the light which you left in my home could be renewed as I trust it will be one of the days that are before us.

I passed Christmas alone in my room, & but for the merriment of the servants the house would have been both still & joyless.

I am rejoiced that you & Mr. Iglehart went to the Bottom to pass your Christmas. I thought of you all that day & was so said that I could not make one of the circle. For me there could be no more delightful place to spend a Christmas than under sister Rosina & brother Tho's hospitable roof. I hope when writing again that you will tell me how you enjoyed yourself at the old homestead.

Earnestly wishing that the new year, on which we have just entered, may, in all its seasons & changes come to — & Mr. Iglehart & to the loved ones around you laden with blessings, I remain your

Affectionate Uncle

J. HOLT.

116 (To Mrs. Iglehart.)*

WASHINGTON *Sept. 28th*, 1875.

MY DEAR NIECE.

I received on yesterday a note of greeting from the young stranger, whose advent has no doubt filled your heart & house with gladness, & am much obliged for this recognition of my interest in yourself & home. I sincerely congratulate you on this accession to your household, & trust that he will prove a jewel whose lustre & worth will grow with the year.

I received your last letter & thank you for it.

With kind regards to Mr. Iglehart, I remain

Your affectionate Uncle

J. HOLT.

P. S. I am much indebted to you for the photographs which you were so good as to enclose me. That of your father is an excellent likeness, but the eyes seem to me sadly spoiled.

J. H.

117 (To Mrs. Iglehart.)*

WASHINGTON *Decr. 29th* 1876.

MY DEAR NIECE.

Since writing you a few days since I have recd. your welcome letter of the 12*st* inst. inclosing the photographs of your brother-, for which you have my sincere thanks. It so happens, however, that I am not sufficiently familiar with their features to enable me to

[* Words enclosed in parentheses erased by pencil in copy.]

distinguish the one from the other, which I desire to do. The ph-tographs are therefore returned with request that you will be so good as to write the name & age on each of them & then re-enclose them to me. They are certainly a group of fine looking young men, & I am glad to believe that their character & lives are even more comely than their faces, handsome as they are.

* * * * * * *

I concur in your regret that I am so far from my relations & have so little opportunity of knowing them well. At my advanced age I greatly need the sympathies which can not be found among the strangers in the midst of whom I live, but there seems to be no prospect that my long years of isolation will terminate short of the grave.

Remember me kindly to your Ma & to Mr. Iglehart, & believe me as ever

Yours affectionate Uncle

J. HOLT.

118 (To Mrs. Iglehart.)*

WASHINGTON, *March* 21*st*, 1881.

MY DEAR NIECE.

You have doubtless long since come to the conclusion not only that I am a laggard correspondent, but that I have been strangely wanting in my duty to yourself. The explanation of my protracted silence is simply this. About the 1st of last October, somewhat hurriedly & unexpectedly, I sailed for Europe, taking sister Rosa with me. The trip was not undertaken for sightseeing or pleasure hunting, but solely in the hope of accomplishing some relief for her broken down health & spirits. * * *

* * * * * * *

Not knowing the address of your brother Thomas, I must ask that you will give the proper direction to the enclosed letter, & have it forwarded to him.

I shall rejoice if the spirit moves you to write me again soon. You can not send your letter- to any quarter where they will command a higher premium than just here.

With best regards to Mr. Iglehart, I remain your

Affectionate Uncle,

J. HOLT.

119 (To Mrs. Iglehart.)*

WASHINGTON *June* 28*th*, 1882.

MY DEAR NIECE.

Your last letter of the 31st of May, was forwarded to me from Ky. & was received in due course of mail. I thank you for it; for its kindly spirit & for the detailed information given in reference to the different members of your family, of whom I never hear ex-

[* Words enclosed in parentheses erased by pencil in copy.]

cept through yourself. I always felt that the removal of your mother to Miss. was a mistaken step & should rejoice over her return to Evansville, alike on her account & Lena's as your own. It is a great gratification to learn that your brothers are all doing so well.

* * * * * * *

I wish I could see your children. The oldest must be large enough for you to begin with him the lessons, which may so impress his future life. We are all so selfish and so unsparing of others by nature, that lessons to coun-eract this evil tendency cannot be commenced too soon or be too diligently impressed. I trust that you will, in all possible ways, teach your children unselfishness, & a considerate & habitual gentleness & kindness for all. Teach them to respect life in whatever form found, as the gift of God & not to be wantonly destroyed; teach them to love flowers, as the smiles of God, to love birds & to feed them, & to look upon their nests as something sacred, to be sympathized with & tenderly watched over. As the cut upon the sapling endures & appears in the future tree enlarged & deepened in its growth, so will such lessons appear in future years, upon the heads & hearts & lives of your dear little children, if you can succeed in impressing them while they are yet young.

* * * * * * *

Pardon the length of this letter & with best regards to Mr. Iglehart, believe me as ever your affectionate uncle,

J. HOLT.

120 (To Mrs. Iglehart.)*

WASHINGTON *Octr. 9th* 1882.

MY DEAR NIECE.

* * * * * * *

I am glad that you think of coming to Washington. You will find my home a very lowly & gloomy one, but my house & heart will be always open to welcome you. Should you come, you must let me know a little in advance, in order that I may be certainly here to meet you. * * *

With kindest regards to your mother & Mr. Iglehart, I am your affectionate Uncle,

J. HOLT.

121 Mrs. Iglehart further testified that in a letter to said Joseph Holt, sent in pursuance of a request from him in a letter to her which she had been unable to find, she sent to him a list of her brothers and sisters and of her own children. Said list was found among the papers of said Joseph Holt and was introduced in evidence by the caveators and is as follows:

[* Words enclosed in parentheses erased by pencil in copy.]

R. S. Holt, died 27″ May, 1867.
Sarah Ellen Holt, born 5″ Oct., 1844.
Joseph H. Holt, " 16″ July, 1846.
John W. Holt, " 21″ July, 1848.
Lockie W. Holt, " 21″ Dec., 1850.
Annie E. Holt, " 15″ May, 1853.
Rob't S. Holt, " 9″ Dec., 1855.
Thomas H. Holt, " 19″ July, 1858.
Lena M. Holt, " 15″ Dec., 1860.
James J. Holt, " 21″ July, 1863.
Joseph H. Holt, died 28″ Aug., 1886.
Annie E. Holt, died 12″ Oct., 1868.
Lena M. Holt, died 25″ Aug., 1882.
Eugene Iglehart, born 21″ Sept., 1875.
Annie Iglehart, " 21″ July, 1877.
Lockie H. Iglehart, " 24″ Sept., 1879.
Joseph H. Iglehart, " 29″ Nov., 1881.

122 & 123 Thereupon the deposition of ROBERT S. HOLT, one of the caveators, son of Robert Holt, a brother of said Joseph Holt, was read on their behalf, tending to prove that said witness met said Joseph Holt on one occasion only, on the occasion of his visit to the witness' mother at Evansville, Ind., in 1875 or 1876; that said Joseph Holt had become very much embittered toward the South and Southern people, growing out of the war, which bitterness existed between him and some members of his family, but not extending to witness' father or the latter's immediate family; that prior to 1883 there was no communication of any kind between Joseph Holt and witness, the latter feeling that if Joseph Holt had permitted the bitterness engendered by the war to render him indifferent toward
124 witness the first advances toward reconciliation must come from him; that in 1879 said Holt wrote a letter to witness' brother, who was then practicing law in Yazoo City, upon the occasion of the latter having saved the life of a Northern man who was attacked by a mob; which letter was much appreciated by witness and was in the words and figures following:

WASHINGTON *August 2d* 1879.

MY DEAR NEPHEW.

I write to thank you—which I do from my heart—& to congratulate you on your heroic resistance to the disgraceful mob, which recently assembled in your city. Your conduct as reported in the public journals was strictly in the line of your duty, & was most honorable to yourself, & was worthy alike of your name, the office you hold, & the majesty of the law you represented. If others have been terrified by a brutal & cowardly crowd, seeking to trample upon the rights of an unoffending citizen, you must have joy in the consciousness that you at least have braved & defied its threatenings. Through the long years to come I am sure that this noble devotion to duty—so conspicuous

amid the demoralization of the times—will be for you a proud and happy memory.

Your affectionate uncle

J. HOLT

Jos. H. Holt Esq.
Yazoo City, Miss.

The foregoing letter and all other letters subsequent to February 7, 1873, and all testimony as to the relations between Joseph Holt and his relatives subsequent to that date were and each
125 and every of the said letters and items of testimony was objected to on behalf of the caveatees on the ground that testimony as to relations between said Holt and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue for the reason that it threw no light upon the question whether or not said Joseph Holt executed the will in controversy, and that it was incompetent upon the fourth issue upon the ground that the revocation could not be shown or inferred from testimony of kindly relationship between said Holt and members of his family arising subsequent to the date of the will; but the court overruled the said objections — admitted the said testimony; to which rulings and admissions the caveatees then and there duly excepted; which said exception was noted at the time upon the minutes of the court; and it was thereupon agreed and stipulated between the counsel, with the concurrence of the court, that said objection applied to all testimony and each and every item thereof so offered and admitted without encumbering the record with a repetition of the said objections and the exceptions based thereon.

The deposition of said witness further tended to show that prior to 1883 he had not felt unkindly toward Joseph Holt, but somewhat resentful that the latter had permitted the bitterness growing out of the war to so affect his relations to his family that he had apparently manifested no interest in the family of his brother, consisting of nine children, the eldest of whom was a student at college at the time of their father's death; that the manifestation of interest in the way of aid or assistance was unnecessary, Robert
125½ Holt's estate being sufficient to take care of his family, but the reference was to such interest, sympathy, and friendship as might be manifested in other ways; that from the year 1883 down to said Joseph Holt's death a correspondence was kept up between them, and thirteen letters between said dates were introduced in evidence, subject to the foregoing exception and stipulation. The following are extracts from said letters:

126 (Rec., —.)

WASHINGTON, *May 11th*, 1884.

MY DEAR NEPHEW:

Since my return from a visit to my old home in the West, I have received your last letter without date, & was very glad indeed to hear from you again. * * *

I am truly sorry to hear what you say of your mother's impaired health & trust that her condition is not so serious as you fear it to be. I am glad that she is out of Miss, but in a climate & breathing an atmosphere which cannot but powerfully aid in her restoration. If John can possibly leave Miss. in August & September, the most dangerous month- I believe, he should certainly do so. I hope you will take the utmost care of your own health avoiding all exposure, overwork & every predisposing cause to disease. By doing this your life may be lengthened out until you can find elsewhere an asylum from the dangers that now surround you.

Affectionately your Uncle,

J. HOLT.

R. S. Holt, Esq.

(To Robert S. Holt; Rec., 584.)*

WASHINGTON, *August 5th*, 1884.

MY DEAR NEPHEW.

* * * * * * * *

The evidences of your professional prosperity furnished by the papers so kindly sent me, gave me great pleasure, & it is with a positive delight that I think of your future as animated by the inspirations of the name you bear, & as honoring that name by your successes.

Your affectionate Uncle

J. HOLT.

127 WASHINGTON *March 20th* 1887.

MY DEAR NEPHEW.

I recd. — read with much pleasure your welcome letter of the 6th inst. you have my hearty thanks for it & for news you have given me of yourself & family, in whose fortunes I feel the deepest interest. * * * I am very sorry our family is so scattered & in consequence see so little of each other. When I heard that you were on a visit to your mother, I regretted much that you were unable to extend it as far as my old home, where you are affectionately remembered & will be always warmly welcomed. I am glad that the place has not passed out of your recollection & that you still contemplate seeing it again when time & circumstances will allow. You know it is your father's birthplace & the home of his childhood & youth and in addition to the inspirations which it must thus have for you, it may not, in its improved condition, be wholly without attractions in itself.

* * * * * * *

Your affectionate Uncle

J. HOLT.

[* Words enclosed in parentheses erased by pencil in copy.]

WASHINGTON *August 4th* 1888.

MY DEAR NEPHEW.

Your letter of the 26th ult. recd. on yesterday, was a surprise, but a most agreeable one, I assure you. I had not before heard that you were even looking in the direction of the Pacific & I now hail your presence there as a marked event in your history & one
128 that may exert a beneficent influence on your future. * * *

Your affectionate uncle,

J. HOLT.

P. S. * * * But under whatever *al*lusions I may be laboring in regard to the Pacific Slope I cannot be mistaken in reference to your professional life in Miss. Most earnestly & constantly have I desired that you might find a higher and broader field of action & a role more worthy of your genius and attainments. Had your father occupied such a field he would have left a good record of himself. He was very eminent in his profession & this I say, not from personal observation—for I never knew him at the Bar—but from the testimony of distinguished lawyers who knew him well & had often witnessed and felt his power in the conduct of his cases.

WASHINGTON, *Sept. 25th*, 1888.

MY DEAR NEPHEW.

I am in receipt of your welcome letter of the 19th inst—also of the photograph of your brother & yourself which you were so good as to send, & for which I sincerely thank you. So far as my imperfect acquaintance with you both enable me to judge I consider them good likenesses. I will give them a place of honor in my house where they will constantly recall my next heirs, in whose prosperity & happiness I feel a deep & enduring interest. * * *

I thank you for what you saw of brother James "record" as reported to you. It accords with intelligence heretofore recd. & which is exceedingly gratifying. His limited education great- increased the obstacles in his way, but he was honest, had an indomitable will, & an ambition to succeed, which he did.

your affectionate uncle,

J. HOLT.

129 WASHINGTON, *Sept. 26th*, 1889.

MY DEAR NEPHEW:

I have not been "surprised" but greatly gratified to receive your last two letters of the 6th and 12th inst. Accept my thanks for the pleasure they have given me. Your descriptions of the wonderful country in which you have cast your lot are very graphic & strongly impress me with a conviction that you have acted wisely & well in turning your back on Mississippi. The favorable views, expressed in former letters, seem to be fully confirmed by further observation, so that in your environment & in the future as it is opening up before you, there appears to be much, very much to animate and encourage you. In this I do heartily rejoice. I wish you could ap-

pear in some trial of public interest, which would enable you to show to the court the Bar and country, what you are. It would be of immense advantage to you. I hope you will seek and find an early opportunity of making this profert of yourself. In this aggressive age, none succeed but those who press to the front. Those who lag are left & lost.

* * * * * * *

I have nothing to say of myself, but that my infirmities grow apace & unhappily can never do otherwise. I have been in the City during the entire summer, but in 8 or 10 days expect to go West on a visit to my old Home where I may remain until about 1st of November. I shall be at all times happy to hear from you, & if I wrote in reply but rarely & briefly, you must know that it is my failing pen & not my heart that is at fault.

Your affectionate uncle

J. HOLT.

130 Said Robert Holt further testified that prior to February, 1873, witness did not know how Joseph Holt felt towards him and devoted little thought to the subject, only feeling that if indifference to the children of his brother could spring from the bitterness and hostility engendered by the war, witness had no concessions or compromises to make on the subject, and that the revival of more interest on the part of said Joseph Holt was first due to the correspondence and friendship which sprung up between said Joseph Holt and witness' sister, Mrs. Lockie H. Iglehart.

The caveator MARGARET T. BOWMER further gave testimony, subject to the said exception, tending to prove that in the fall of 1876, she and her husband having stopped at a hotel in Washington, Joseph Holt took them to his house and entertained them two days and nights, treating them affectionately, and telling Mrs. Bowmer that it was like having his own dear sister back again; that said Joseph Holt never visited her father's house after the first year of the war; that he did not revisit Kentucky until 1869 or 1870, when he stopped at the old homestead, with the family of Thomas Holt; that at that visit there were cold and strained relations between him and said family; that he did not visit there again until the Centennial year and after the death of Thomas Holt;
130½ that his relations to witness were always pleasant until 1879, when trouble arose between them from Mrs. Washington Holt and her mother telling him she criticised him, which statement was wholly untrue; that witness wrote a letter in the effort to affect a reconciliation, which was not answered, and that said Joseph Holt never communicated with her at all afterwards, but that her daughter, Nellie Burks Holt, had letters from him down to 1888.

Letters from said Joseph Holt to Mrs. Bowmer or her daughter Nellie after Feb. 7, 1873, were introduced in evidence by the caveators (subject to the foregoing exception and stipulation). The following are extracts from said letters:

131 WASHINGTON, *Decr.* 22*d*, 1875.

MY DEAR NIECE

Your letter of the 7th inst has been received, & I have read it with the greatest pleasure. I thank you so much for sending me all the news of the family, which but for you I would never hear. You have greatly improved in your writing & composition since the date of your last letter, & I am sure that none of the little girls at your school are learning faster than you are. I am very glad indeed to believe this. I am delighted that your mother has given you all of your Grandma's name. I shall love you the more for that.

Some days ago, I sent you by the mail, a volume of Anderson's Fairy Tales, which I hope you will find time to read. They are beautiful stories & cannot fail to interest you. You should read them carefully, so that you will be able to remember them & talk about them to your playmates & friends. It will give them great happiness to hear you.

I shall not be able to leave home this winter, but expect to see you all next summer. Thank your Ma for me for her letter, which was very welcome. The sight of her handwriting always gladdens my eyes. Give her my love & accept of it for yourself, from your affectionate

uncle J. HOLT.

Miss Nellie Holt Bowmer.

132 (To Mrs. Margaret T. Bowmer.)

WASHINGTON, *Feby* 28*th*, 1876.

MY DEAR NIECE

I was much gratified, a few days since, to receive your letter of the 17th inst. together with Nellie's. What you say about the improvement in your health gives me great pleasure—the more so, because of the solicitude and anxiety I have felt on the subject for several years. * * *

What you say of the ill health of Sister Rosina & brother Thomas gives me much sorrow. I am most anxious to see them both again, & promise myself that happiness during the coming summer.

Be assured that Nellie's letters can never "worry" me. On the contrary they always give me a joy which, I am certain, will increase with her years.

With much love to yourself and the children, I remain,

Your uncle,

J. HOLT.

133 (To Mrs. Margaret T. Bowmer.)

WASHINGTON, *July* 25*th*, 1876.

MY DEAR NIECE.

I am much obliged for your pleasant and kind letter of the 12th inst, & for the interesting family news it brings me.

Those weddings, of which you speak,—though they do not at all

concern me,—may be accepted as proofs of some lingering vitality in the quiet old "Bottom" which cannot be otherwise than gratifying. What you say of your visits there, expresses my own feelings. I am sure I shall find there a sad & dreary blank, which nothing can fill. Still I earnestly desire to see the old Homestead again, whatever gloom may overhang it, and hope to be able to do so, in September or October. * * * I anticipate great pleasure in meeting you and yours once more, & shall be very sadly disappointed. * * *

I read with much pain what you write as to brother Thomas' condition. I have been indulging the hope that his health was improving. * * *

With love to the children, I remain your affectionate uncle,

J. HOLT.

(To Mrs. Nellie Holt Bowmer.)

WASHINGTON, *Jany.* 3*d* 1879.

MY DEAR NELLIE:

* * * I thank you very much for your letter, & for all the pleasant news it gives in regard to yourself, your school, family & friends. I am sure none of my nieces could have written a letter that would have given me more pleasure.

Your New Year gift also came safely to hand this morning. It was quite a surprise. It is very beautiful & I am quite proud of it, as I am grateful, to be so remembered by you. Be assured that I shall love every stitch of this cushion for your sake, & shall never look upon it without thinking lovingly of the dear little fingers which have so toiled to give me this happiness. You may be sure that my heart will not forget such fingers as these.

* * * * * * *

With love to all, I remain your affectionate uncle—

J. HOLT.

(To Mrs. Nellie H. Burks.)

WASHINGTON, *July 8th* 1888.

MY DEAR NELLIE.

I have received and read with much satisfaction your letter of the 3d inst, which was a surprise as I had not supposed that the matter about which you write had made any impression on your memory, if, indeed, it had at all, attracted your attention.

I understood at the time that the visit made by Vanda & myself, was to the Ladies of the House, generally, without any designation of names—which, of course, included yourself—& I believed that it was so made known to the servant, though I cannot recall Vanda's exact words. I expected to see you, & this expectation continued up to the moment we left. I did not feel privileged to ask why you did not recognize our visit. It is clear enough now, from what you say, that there was a misunderstanding on your part, and it is gratifying to realize that it was this misunderstanding & not an

unwillingness to meet me, that lost me the pleasure of seeing
135 you—I trust that I shall be more fortunate when I visit the West again.

Allow me, though at so late a day, to congratulate you which I do heartily—on the new life upon which you have entered. I hope that it will fulfill all your dreams, & that its joys will grow with the many years that I love to believe are in store for you.

Affectionately

Your Uncle,

J. HOLT.

(To Mrs. Nellie H. Burks.)

WASHINGTON, *August 6th*, '88.

MY DEAR NIECE.

I thank you for your kind letter of the 19th ult & for the enclosure which you were so good as to send & which is now returned. It is a privilege, doubtless, but rather a sad one, to be allowed to confront one's green youth, face to face, as this letter enables me to do. I was then in my fifteenth year, just escaped from the woods to the college grounds, & with very primitive views of the world's life, whose threshold I was crossing. It is gratifying, however, to observe, that even at that early age, I had formed good resolutions for my future guidance, little dreaming of the obstacles with which "the world, the flesh & the devil" might block my pathway.

I read with much pleasure what you say of the railroad. Its whistle will help to wake up the somewhat chronic torpor of the Bottom & transform generally its quiet life. I hope this transformation will bless you in many ways. As to myself I am too old to "catch on to it" with anything like active sympathy. The little fragment of life remaining to me must be lived out, in memory,
136 among the barges, flatboats & steamers, the log cabins, forests & bridle paths of the long ago.

I sent you the photograph as requested, some days ago.

With hearty good wishes, I remain your affectionate uncle

J. HOLT.

Mrs. Nellie H. Burks.

137 The caveator WILLIAM GREENE STERETT testified that Joseph Holt visited his father's house in 1860, remained a day or two, and was upon kindly relations with his sister, witness' mother; that he never visited her after that date and was not present at her funeral, in 1863, but, he thinks, wrote her one letter between 1860 and her death; that witness was entertained by him as his guest at the Hot Springs about 1877; also in Washington in 1888; that witness moved to Washington in 1889, after which he saw him constantly, and kindly and affectionate relations existed between said Holt and witness and his family, making them frequent presents, taking witness' wife and children to drive with him, and speaking to others of the great pleasure which he derived from having witness' family so near him in his old age; said witness'

testimony being admitted subject to the said objection above mentioned.

Said witness further testified that in 1867 James Holt, a brother of Joseph Holt and an uncle of witness, with whom witness was then studying law, died unmarried and childless; that after witness moved to Washington, in the year 1889, said Joseph Holt talked with witness about the said James Holt; and thereupon, against the said objection of the caveatees that testimony as to conver-
138 sations between the witness and said Joseph Holt concerning James Holt had in the year 1889 or subsequent thereto was incompetent to be received or submitted to the jury upon the question of the genuineness of the will or upon any other issue in the cause, said James Holt having died six years before its execution, childless, and that the admission of said testimony was calculated to confuse and mislead the jury, —; but the court overruled the said objection and permitted the witness to further testify as follows:

A. He made inquiries about his brother James, and I told him about how he stood in the State and about his character as a lawyer. He said he was a remarkable man, a man without education—for Uncle James had no education—who by force of his genius, of his intelligence, forced himself to the front, and this, too, notwithstanding Uncle James had nearly always been an invalid—had been an invalid for years.

Q. What had been your uncle James' sympathies during the war?

A. His sympathies were with the South.

To the admission of which testimony the caveatees objected before the same was given, upon the grounds aforesaid; but the court overruled the said objections and admitted the same; to which ruling and admission the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

On cross-examination said witness testified that he was not aware whether Joseph Holt knew whether witness was living or dead in 1873, and that there was no intercourse between them of any
139 kind between 1864 and 1878; that in 1864 he had written Joseph Holt for advice to guide him in life, being then a college student, and that Joseph Holt had replied he knew no man better capable of advising witness than his father.

The evidence for the caveators (admitted subject to the objection and exception aforesaid) further tended to prove that in 1891, while Eliza Sterett (a relative by marriage of the caveator William G. Sterett) was in Washington, said Joseph Holt inquired of her kindly about Mrs. Bowmer and her family; spoke of her without any trace of bitterness or animosity, and said to said Eliza Sterett that he had none of his sister's writing that he could find, and that he would like to have Mrs. Bowmer furnish it, and further said to the witness in that connection, "Tell Maggie (meaning Mrs. Bowmer) to send it to me on your return home;" that on her return to

her home, in Kentucky, shortly afterward Mrs. Sterett communicated this message to Mrs. Bowmer, and that Mrs. Bowmer complied with her uncle's request.

That in 1877 said William G. Sterett, at the invitation of his uncle or of his aunt Rosina (Thomas Holt's widow), visited them for a few days at Hot Springs, Arkansas; that during that visit the relations between said Sterett and his uncle Joseph were very
140 kindly, and that again, in 1888, when Mr. Cleveland was inaugurated President, said Sterett and Col. Dick Wintersmith took breakfast with said Joseph Holt at the latter's invitation; that said Sterett was in Washington about three days on that occasion and saw said Joseph Holt on several occasions and their relations were then very friendly; that in 1889 said Sterett came to Washington and has resided here ever since with his family, consisting of his wife, his three children, Willie Greene Sterett, who was born about 1881; May Sterett, who was born about 1882, and Malcolm Sterett, who was born about 1872; that from 1889 until said Joseph Holt died the most affectionate relations existed between him and said Sterett and his family; that they all visited him frequently at his house, and that he always received them cordially; that he frequently went in his carriage to their house and took Mrs. Sterett or the children out driving; that he frequently gave Mrs. Sterett money in small sums and made presents to the children, and that during this time he spoke to others of the great pleasure which he derived from having said Sterett and his family so near him in his old age.

As to the relations that existed between the caveator Washington D. Holt and his family, on the one hand, and said Joseph Holt, on the other, after February 7th, 1873, the caveators gave evidence to the jury (subject to the objection and exception of the caveatees above noted) that from about that time until a few years before his death said Joseph Holt visited the old homestead, where they lived, every year and sometimes twice a year, remaining usually two or three weeks; that said Washington Holt and his wife, Vanda Holt, and his daughter, Mary Holt, after 1873 visited said Joseph Holt at his house, in Washington, on many occasions,
141 sometimes together and sometimes separately; that in the years 1878 and 1879 said Vanda Holt, being an invalid, remained at the house of said Joseph Holt, in Washington, for five or six months, being attended by physicians, who were paid for their services by said Joseph Holt; that these visits continued till shortly before the death of said Joseph Holt, said Washington Holt visiting him in the early part of August, 1893, the year prior to his death, and said Mary Holt being in Washington for several months in the year 1893, stopping at a boarding-house, on account of her uncle's illness, but visiting him every day and ministering to his wants; that during the period from February 7th, 1873, until the death of Joseph Holt a constant correspondence by mail was kept up between said Washington Holt and his wife, Vanda Holt, and his daughter Mary, on the one hand, and said Joseph Holt, on the other, the last letter of this correspondence being one written by Mary Holt to said

Joseph Holt, which was in the post-office at Washington when he died; that during these years said Joseph Holt made many gifts and presents to said Washington Holt, his wife and daughter; that in 1889 said Joseph Holt sent said Vanda Holt and her daughter Mary to Europe, paying their expenses, and that up to the time he died nothing had occurred at any time to interrupt the intimate and affectionate relations that existed between him and said Washington Holt and his family.

Subject to the above-mentioned exception of the caveatees to each and every part of the said testimony and to each and every of the said letters, the caveators introduced a large number of letters from said Joseph Holt to said Washington Holt or his family, conceded to be in the handwriting of Joseph Holt. The following are extracts from which letters:

142 (To Mrs. Rosina Holt.)

WASHINGTON *Oct. 14th*, 1876.

MY DEAR SISTER.

I reached home safely & would have had a pleasant journey but for the sad memories of the bereavement you & all of us have suffered, which followed me, you have my heartfelt sympathy in the great sorrow which has come upon you. Our grief, however, & bitter sense of loss should be mitigated by a conviction that the loved & the lost one was prepared for the change & has been blessed by it. The remembrance of his noble life & of the virtues which so distinguished it will be, I am sure, as an inspiration & a fragrance for us all which can never lose their freshness. Let the hope of rejoin*gin* him in the better world encourage & strengthen us to bear the burden & perform the duties which are yet upon us.

* * * * * * *

If I can be of any service do not hesitate to let me know it.

* * * * * * *

I shall at all times be most happy to hear from you & shall be always thankful for a letter however brief, from any member of the family.

With love to all, I remain, your affectionate brother,

J. HOLT.

143 WASHINGTON *Decr. 15th* 1876.

MY DEAR NIECE.

I have received and read with great satisfaction your kind letter of the 28th ult. While I desired so much that you should see the Exhibition, I still had fears that your strength might not prove equal to the undertaking. The greater therefore is my joy now to realise, as I do from your letter, that your strength bore up under all the fatigues, & that you were enabled to walk through & examine & enjoy that great treasure house of the arts, not only without exhaustion but without serious discomfort. It makes me very

happy indeed to know this, & to be assured how much pleasure the memories of this wonderful feast will afford you in all the years to come. * * *

I thank you for what you say of your visit to my lonely home. It was like a burst of music & sunshine into its silent chambers. Yet it was tantalizing and unsatisfying for me, because it was so brief. The cup of its enjoyment scarcely touched my lips before it was snatched away again. Could you have remained long enough to enable me to show you the city & its attractive surroundings, & to make you understand that you were not only in my home but in my heart also, my gratification would have been great indeed. I comfort myself with the hope that I shall yet be able to welcome you to my house under more favorable circumstances.

* * * * * * *

If you knew how much pleasure your letter gave me, I am sure you would write again. Will you not. You could not have a more obliged or grateful correspondent.

With love to my dear sister, Washington & yourself, I remain your

affectionate uncle,

J. HOLT.

Mrs. Vanda Holt.

144 (To Mrs. Vanda Holt.)

WASHINGTON *July 26th* 1881.

MY DEAREST NIECE.

I wrote you at some length on the 19th inst.

Owing to some improvement in Annie's condition, and to the assurances given me by the servants as to their conduct during my absence, I have determined to set out for the west on Friday morning. If the connections are made on the route, I ought to reach your landing by the Packet of Sunday. At this season, and in the probable state of the river, I suppose there will be little reason to fear an arrival by night, which I especially desire to avoid. The prospect of being so soon with you again under the roof of the old home, so engrosses and transports my life, that I can think of nothing else. Preferring, as the good St. John says, "Not to write with paper and ink the many things I have to say, but trusting soon to speak them to you face to face," I remain, with love to Washington and the children, as ever

Your loving uncle,

J. H.

145 (To Mrs. Vanda Holt.)

WASHINGTON, *Oct. 16th* 1881.

MY DEAREST NIECE.

* * * * * * *

In the light of your restored health, the world for me clothes itself in summer robes and I realize that in your happiness I shall find an abounding compensation for all ills possible to myself. But

be careful that your growing strength does not tempt you to overtask it. Let the beneficient process of nature, now going on in your behalf, be aided and encouraged in every possible way. Suffer no toil or neglect or undue exertion to occasion it a moment's embarrassment. The opinion of the physicians as to the character of that tumor has brought me great relief. * * *

* * * I accept it as a great compliment that when you wish to talk, you think of me. It shows how justly you have appreciated me as a fond and delighted listener. Your bright, gentle words have always been music for my ears and manna for my heart. You have inspired

ing more conspicuously than in this.

I am rejoiced that you have procured so fine a piano, knowing as I do, how large a contribution it will make to the intellectual pleasure of your life. Did you dispose of your old instrument? I have a piano here, "as good as new" which I wish Mary to have when I am gone.

* * * * * * *

With love to Washington and the children, I am, ever your loving uncle.

146 (To Mrs. Vanda Holt.)

WASHINGTON, *Feb'y 5th* 1882.

MY DEAREST NIECE.

* * * * * * *

Tell Mary & Rosa, that if they knew how thankful I am for their letters, & how much pleasure I have in reading them over & over again, I am sure they would write more frequently. It would be good exercise for them, & their dear little letters could not receive from anybody a warmer welcome than I would give them.

* * * * * * *

Pray do not, from a feeling of mistaken kindness towards myself, withhold any information concerning your health. Let *me* have the privilege of sharing your joys & your sorrows whatever they may be.

147 (To Miss Rosa Holt.)

WASHINGTON *Feby. 20th*, 1882.

MY DEAR NIECE.

You have my sincere thanks for your last letter, & also for the letter which you were so good as to send me in December. You have improved so much in your handwriting, which I am delighted to see. Your letter is in every way nice, & I am sorry only because it is so short, but I am sure you will make the next one longer. You might have told me something about the windmill, how it looks & how you like it. I think of it often, & hope it will make the grass & flowers happy next summer by the water which it will pump for them out of the well.

With love to your Ma & Pa & to Mary, I remain your affectionate

Uncle,

J. HOLT.

P. S. I must not omit to tell you how pretty your Valentine is. I shall preserve it fondly & it will always have something sweet to say to me about my dear little niece.

148 (To Washington Holt.)

WASHINGTON *July 2d*, 1882.

MY DEAR NEPHEW:

* * * I read with absolute delight, what you say in regard to a continued improvement in Vanda's health & the disappearance of those symptoms which alarmed me so much while I was with you. While it is most gratifying to be assured that my endeavors for her happiness are so generously appreciated by you, yet it must be stated that these endeavors have constantly brought with them their own abounding reward, & I desire no other. The restoration of her health & the prolongation of her life are with me objects of ceaseless & supreme solicitude, & they can never be otherwise. You can hardly yourself realize more anxiously than do I, how much of the future is bound up with that life, which is so unspeakably precious to your family & home.

* * * With love to her & the dear little children, whose letters I have also received, I remain your

Affectionate Uncle,

J. HOLT.

149 (To Mrs. Vanda Holt.)

WASHINGTON *Feby. 1st* 1885.

MY DEAREST NIECE.

* * * * * * *

You have lost nothing from not hearing from me more frequently. Nothing has of late occurred in my own life or home worth mentioning, & as to the outside world, reprehensible as such a course may be, I have come practically to ignore it.

* * * * * * *

Table scarfs and all such cunning devices of Web's needle are luxuries, but letters—your letters I mean—are necessaries not to be dispensed with whatever their cost.

150 (To Miss Mary Holt.)

WASHINGTON *Jany. 18th*, 1887.

MY DEAR MARY.

* * * * * * *

I am happy to learn that your recollections of your visit here are so pleasant. I feel, however, that it was not so enjoyable as it should have been. I am thankful to you all for your brief stay under my

roof & cannot be too grateful for the sunshine you brought & left in my desolate home. If my life is spared, I hope to have the pleasure of welcoming you here, not once, but many times in the future. My house, like my heart will be always open to receive you.

Do not let our correspondence become in the least degree a burden to you. Write only when you feel in an epistolary mood & be assured that your letters, however, brief, will be always a bonne bouche for my hungering sympathy with your precious young life.

Let me know when your supply of wide ruled paper is exhausted & I will send you more. Love to your dear Mamma, if she is still in Louisville.

Your affectionate Uncle,

J. HOLT.

151 (To Washington Holt.)

WASHINGTON, *May 13th*, 1887.

MY DEAR NEPHEW.

* * * * * * *

The old home is a veritable oasis for me, & if there is gladness for me on the earth, I am sure to find it there.

* * * * * * *

I now enclose you a draft on New York for $1100, which I hope will come to hand safely & in good time. The day when the next installment will fall due the 20th of August will not be lost sight of.

* * * * * * *

Love to Vanda if she is with you & to Rosa.

Your affectionate uncle,

J. HOLT.

152 (To Mrs. Vanda Holt.)

SEPT. 16TH, 1887.

MY DEAREST NIECE.

* * * * * * *

Washington's letter was duly received & much enjoyed. As a chronicler of news, vigorous & trenchant, he certainly is a decided success. Tell him, when he has leisure, & is disposed to unbosom himself, I shall be always happy to hear from him in the same vein, & will heartily accord him the same thanks that I do now.

* * * * * * *

153 (To Miss Mary Holt.)

WASHINGTON, *Decr. 17th*, 1888.

MY DEAR MARY.

* * * * * * *

You say you had a real thanksgiving day, but omit to say where or how you passed it. This was disappointing to me. I must tell

you, as I have often told your dear Mamma, that I have a great fondness for *details*. Generalities, however glittering, do not satisfy me. Please, when writing, remember this, & respect the infirmity, if it be one, although you may not be afflicted with it yourself. My interest in you & Rosa may be too intense, & I may crave to know too much about your precious young lives, but it can't now be helped. So I must beg that you will kindly feed a hunger that cannot be otherwise stilled in its clamors.

I thank you for all that you have so sweetly said about our passing the coming Christmas together, but such a happiness is not in store for me. I shall be with you in spirit, most lovingly so. Indeed, in this role of *spiritual* attendance, I may be well said to be an inhabitant of the dear old Home the year round. I hope it will be for you the merriest of Merry Christmasses, so merry & soul feasting, that amid the years to come, through whatever pleasures and palaces your feet may be conducted, you will always recall with a full, loving heart the Christmass of 1888, passed in the home of your childhood. In none of your letters have you made any allusion to your *watch*. Is it behaving so badly as to be unworthy of mention? I hope not; but as it was guaranteed to be a perfect time-keeper, I am anxious to know something about its performances.

* * * * * * *

I heart full of love to dear Rosa & the same for yourself.

Your affectionate uncle,

J. HOLT.

154 (To Mrs. Vanda Holt.)

MAY 24TH, 1889.

MY DEAREST NIECE.

I reached home on Wednesday afternoon, having passed a day and night at Lexington. Could I have forgotten my separation from you & yours & the dear old Home my journey would have been one of unalloyed pleasure—,but, as it was, the shadows fell thick and fast around me. I cannot express to you the height or depth or intensity of my grateful sense of the ever multiplying kindness lavished upon me under your hospitable roof. Yours is truly a heart home and in it—in despite of some physical aches--I was as happy as are the bees in summer flower gardens.

I enclose a draft on New York for $700 as promised, but fear that it may fail to meet all your requirements. * * * If anything should occur while abroad, making it necessary for you to have more funds, do not hesitate to telegraph me, & the needed remittance will be at once made.

* * * * * * *

I will not ask you to send me letters of any length while abroad, for I know it will not be in your power to do so; but if you can occasionally write me a few lines—*no matter how few*—saying that you are well and happy, it will afford me immense gratification—indeed such words would be as refreshing showers for the parching

drouth with which my poor life is now threatened. Praying that angel wings may be ever over you & mary, whether upon the land or on the sea, I remain now & always, your loving uncle—

(Page 1173.)

(To Washington Holt.)

WASHINGTON *August* 21*st*, 1889.

MY DEAR NEPHEW.

* * * * * * *

If you will leave home on Wednesday, 4th Sept., you will
155 arrive at New York in time to give you two whole days Friday & Saturday for sight-seeing. Which I am sure you will be able to spend the more profitably & pleasantly, since your glimpses of New York have thus far been very hurried & necessarily unsatisfactory. Please do not fail to telegraph me from New York the road & train by which you will come, otherwise I shall be deprived of the great pleasure I promised myself, of meeting you all at the Depot here.

* * * * * * *

Your affectionate uncle,

J. HOLT.

(Rec., 1241.)

(To Mrs. Vanda Holt.)

WASHINGTON *Oct.* 2*d*, 1890.

MY DEAREST NIECE.

Your last lost precious letter has filled me with rejoicing. The news it brings that Washington has begun to improve has removed a mountain of anxiety & apprehension from my heart. Most warmly do I congratulate you. Be assured that with every throb of life I have sympathized with you both throughout the fearful sufferings you have been enduring & now that deliverance seems to be coming in sight I am glad as the night watcher on whom the sun has risen.

* * * * * * *

Love to all, your loving— UNCLE.

(To Mrs. Vanda Holt.)

WASHINGTON, D. C. *March* 22 | 91.

MY DEAR NIECE.

* * * * * * *

With love to Washington & Mary, I remain as ever your
156 loving un-le

J. H.

P. S. Should my case at any time become critical I shall wish to see you at once & will not delay saying so to you by the telegraph.

(To Mrs. Vanda Holt.)

WASHINGTON D. C. *April* 12, 1892.

MY DEAR NIECE.

* * * * * * *

Should my sorrows ever render your presence here indispensable I will not hesitate to say so.

Wishing you and yours a happy return to your beautiful home, & with love to all I remain, your affectionate,

UNCLE.

(To Mrs. Vanda Holt.)

WASHINGTON, D. C. *June* 26, 1892.

MY DEAR NIECE.

I am again at home. * * *

Let me beg that you will not grow weary of writing to me because unhappily I — no longer capable of responding as in other & happier days your letters are almost the only fountain left me in the desert of my closing life, out of which I can drink & be glad. Love to Washington & the children, you- affectionate uncle—

(To Mrs. Vanda Holt.)

WASHINGTON, D. C. *Feb.* 4, 1893.

MY DEAR NIECE.

* * * * * * *

157 I am glad that Mary came to Washington as she seems to be enjoying herself very much. Her visits are sunbur-ts for my darkened room & yet more darkened life. I have bitter sorrow that she cannot be under my own roof, but this — selfishness on my part, for she is doubtless better & happier where she is.

* * * * * * *

Love to all &c.

You- affectionate— UNCLE.

(To Wash. Holt.)

WASHINGTON, D. C., *June 26th*, 1893.

MY DEAR NEPHEW.

Your last letter was an agreeable surprise & received a most hearty welcome. Your handwriting alone was a gladsome sight to see, so long have my eyes been deprived of the pleasure of looking upon it. From what you say & in the tone of your letter I find an assurance that your health is much better than I have been fearing it was. The opinion of the Doctor that your trouble is not strictly paralysis is most encouraging & relieves me of much of the *inaful* anxiety from which I have been suffering.

* * * * * * *

With love &c.

Your affectionate uncle,

J. HOLT.

(To Mrs. Vanda Holt.)

WASHINGTON D. C. *Jan.* 13, 1894.

MY DEAR NIECE.

* * * * * * *

As the darkness closes in around me the sunlight of your pages seem to grow brighter & brighter day by day.

* * * * * * *

158 I am much encouraged by what you say of Washington condition and cheer myself from hour to hour by the strong hope that the sunshine and balmy airs in which he is bathing his faithful life will yet make him himself again.

* * * * * * *

As you are necessarily incurring unusual expenses this winter a remittance may become desirable. If so let me know. I can send you a draft on New York for five hundred dollars at any time it may be agreeable to you to receive it.

* * * * * * *

Of course you know the consolation I always find in your letters & the anxiety with which I await their coming, but you must not give me more than my share of your precious time.

* * * * * * *

With love to Washington & the children, I remain your affectionate Uncle.

159 The caveators further offered testimony tending to prove that Joseph Holt purchased two tracts of land in Kentucky and added them to the homestead farm, conveying them to Vanda Holt and to her children after death; that from 1873 until 1876 Washington Holt's family had lived at Cloverport, Ky., and since 1876 lived at the old homestead at Holt's Bottom; that upon Joseph Holt's repeated visits to the old homestead there were no family gatherings there, but that said visits were confined to Washington Holt and his family; that upon these occasions he did not visit Mrs. Iglehart, who was within two or three hours' ride from Holt's Bottom, nor Mrs. Bowmer, who lived within six miles away; that he rebuilt the house at Holt's Bottom, planted trees and flowers, beautified the grounds, at a cost of about $12,000; that he gave Vanda Holt $40,000 in Missouri State bonds; that he declared his life was a desert without an oasis until Washington Holt and his family came into it, and that after that he had something to live for. All of which testimony was given subject to the above-mentioned objection and exception and subject to the stipulation between counsel, entered into with the concurrence of the court, that the said objection and exception should apply to each item of the testimony so admitted over said objection.

Thereupon further evidence was admitted on behalf of the caveators tending to prove that between the years 1884 and 1893 said Joseph Holt on several occasions told Washington D. Holt that he, Joseph Holt, had made him, said Washington Holt, his executor;

that there would be ample means provided always to keep sheriff off; that the law had been pass- (allowing executor to qualify without giving bond) and all you will have to do now is to come on here and take possession of everything; that on visit of Washington Holt to Joseph Holt in the year 1893 Joseph Holt said to Washington Holt, "Washington, I want you to know that everything I have is yours;" that said Joseph Holt, during the same period, on several occasions informed Mary Holt and her mother, Vanda Holt,
160 that they would be much better off after his death; that they would then go to Europe; that said Mary Holt must become proficient in French, so that while in Europe she could act as their interpreter; that during the same period he told the servants in his house on divers occasions that said Washington D. Holt would have charge of his affairs after his death. To the admission of which testimony as to the declaration by said Joseph Holt touching the disposition of his property after his death the caveatees, by their counsel, objected before the same was given, on the ground that such testimony was incompetent for the purpose of throwing any light upon the question whether or not the said Joseph Holt executed the paper-writing in controversy, and that such testimony was incompetent and inadmissible upon the question whether or not the said paper-writing, if executed by the said Joseph Holt, was ever revoked by him, or upon any other issue in the cause, for the reason that under the rules of law revocation could not be shown in that manner; but the court overruled said objection and admitted the said testimony; to which rulings and admissions the caveatees then and there duly and separately excepted, and the court noted the said exception upon its minutes.

And it was stipulated by the counsel for the caveators and caveatees respectively, with the concurrence of the court, that the said objection and exception should apply to any and all other testimony of like character offered and admitted, without delaying the trial and encumbering the record by the reiteration of the said objection and exception.

161 The witness WASHINGTON D. HOLT further testified, against the objection of the caveatees and subject to their exception, upon the grounds hereinbefore set forth as to testimony of that kind, that there were peculiarities in the body of the alleged will, in the style of its composition, which indicated that it was not that of Joseph Holt; that it was not finished nor scholarly, and that the word "standard" was used, when the language would have been more elegant and expressive without it, and that he did not believe the said Joseph Holt would have used said word; that he never used a superfluous word.

The caveators further gave evidence to the jury tending to prove that about the year 1890 said Joseph Holt became afflicted with a progressive disease of his eyes which rendered it more and more difficult for him to read and write; that thereafter letters received were read to him by his servants, his replies were written by the servants at his dictation; that from this time until his death he

ceased his visits to Kentucky and lived in his house with his servants, receiving occasional visits from his friends; that about a week before his death he fell in walking downstairs and received injuries which confined him to his bed until his death; that William G. Sterett and his wife thereupon took possession of his house, being, with the servants, its only occupants until the next day, when they were joined by Washington D. Holt and his wife; that the servants gave Washington D. Holt the keys of Joseph Holt's desk and closet, where his private papers were kept, except such as were at the National Safe Deposit Co., which keys, under the said objection and exception of the caveatees, testimony was offered tending to show that said Joseph Holt had directed his servants to take, a few
162 days before his death, and deliver to Washington Holt and to nobody else; that said Washington Holt and William G. Sterett thereupon made a search among the said Holt's private papers in his desk and closet and in his safe-deposit box, but found no will or testamentary paper of any kind; that the body was taken to Kentucky for interment, immediately after which Washington D. Holt and William G. Sterett returned to Washington and made further and thorough search for a will, but found no paper of a testamentary character except a memorandum in his handwriting as follows: "I give and bequeath to the Washington Humane Society, incorporated by the acts of June 21, 1870, and Feb'y 13, 1885, the sum of — dollars;" that subsequently the trust officer of the National Safe Deposit, Savings & Trust Co. made a thorough search of all his papers, but found no paper of a testamentary character, except the will of 1848, and a memorandum on a rough piece of paper as follows:

Humane Society	$15,000
Children's hospital	4,000
Lodging-house	1,500
Emergency hospital, or dispensary	1,500
Associated Charities	1,500

The said testimony of the caveators further tended to show that during the search conducted by the said Washington Holt and William G. Sterett a number of private letters which said Holt had received from Washington Holt and family were burned in a coal scuttle in the yard by one Charles H. Strothers, one of the servants of the said Joseph Holt; that some old newspapers and circulars were burned in a fireplace by the direction of said Washing-
163 ton Holt and Sterett; that no other of his papers were destroyed after his death, and that the paper-writing in controversy was never seen by any of the relatives of Joseph Holt nor his servants until after August 26, 1895; that Washington D. Holt, William G. Sterett, and John W. Holt made two affidavits in September, 1895, in the orphans' court; that Joseph Holt died intestate; that upon said search all Joseph Holt's papers were found in methodical shape; that he was very methodical in the way he kept everything, and that his papers were found in a methodical and carefully kept condition, tied up in packages, and endorsed; that he was very methodical, knew just where he put everything, and

after the trouble with his eyes could always send a servant just to the spot where everything was that he wished to have.

The caveators further offered evidence tending to prove that Luke Devlin was a messenger in the office of the judge advocate general from 1862 until 1869, and performed the ordinary duties of such a messenger; that in 1869 he was promoted by said Holt to a first-class clerkship in said office, holding said position until February 7, 1873, and afterwards occupying a room separated by an intervening room from that of the said Holt, and did not come at all in contact with the said Holt in the performance of his official duties while he was clerk, and that there were never at any time any social or business relations between the said Holt and the said Devlin.

Thereupon the caveators examined as witnesses on their behalf PERSIFOR FRAZER and DAVID N. CARVALHO as experts in matters relating to the genuineness of writings, and their
164 evidence tended to prove that neither the signature to said paper-writing dated February 7th, 1873, nor any portion of the body of said paper was written by the same hand that wrote the letters of said Joseph Holt which had been put in evidence by the caveators and which were admitted by the counsel for the caveatees to have been written by said Joseph Holt; that the paper had been wholly or partly severed along a line just over the signature "J. Holt" by a knife or other sharp instrument; that afterwards the whole paper had been pasted on another piece of paper, and that a part of the flourish at the end of the signature "W. T. Sherman" had been erased with some sharp instrument. The evidence of said Carvalho further tended to prove that said instrument had been ironed to give it the appearance of age, and that the signature "Ellen B. E. Sherman" was written by the same hand that wrote the body of the instrument. Said Carvalho, in the presence of the court and jury, applied a liquid to one of the words of the paper, and thereupon declared that the ink was loaded with archil, which was characteristic of Arnold's chemical fluid, in which fluid archil has been used for the last ten years and not earlier; that archil, though an old compound, came into use as an adulterant of inks used in writing not more than ten or twelve years ago.

Said Carvalho further testified that he had compared the envelope in which the will was mailed to the register with the photographs produced by caveatees of certain lettering upon the Holt stable, which lettering, it was conceded, was done by Strothers; that the photographs evidently were made smaller than the stable and the lettering thereon, and that such letters so reduced were in-
165 capable of fair comparison with the envelope, and that he found nothing upon which to formulate an opinion which would be of any value; that the punctuation marks on the envelope showed no likeness or habit similar to the punctuation in the letters written by Strothers for said Holt; that where Strothers used a thick pencil it made large punctuation marks, and where he used a pencil with a sharp point it made very small punctuation marks.

Said witness, Frazer, further testified that the usual wide margin

between the upper edge of the sheet and the first ruled line was wanting in the paper purporting to be the will; that there is usually a wide margin between the upper part of the sheet and the first ruled line which is wanting; that the distance from the upper edge of the first ruled line is less than the distance between the two lines themselves on the will; that he did not know whether there was any regulation width for foolscap paper, and that he was not an expert in that line.

Thereupon MARTHA SCOTT, a witness on behalf of the caveators, gave testimony tending to prove that she was in the service of Joseph Holt as house girl from 1882 to the time of his death; that it was a part of her duty to answer the door bell, and that Mrs. Throckmorton, Sr., the mother of Major Throckmorton, frequently called.

And thereupon said witness was interrogated as follows:

"Q. What would occur when she would call?"

To which interrogatory the caveatees objected, on the ground that relations between said Holt and Mrs. Throckmorton, Sr., in the year 1882 and subsequently, could throw no light on the question as to the execution of the will, and that any unfriendly relations between them at and after said date was not competent evidence upon the question of revocation, and on the further ground that relations at said date existing between said Joseph Holt and Mrs. Throckmorton, Sr., were incompetent as against any party to the suit; but the court overruled the said objection and permitted the witness to testify that Joseph Holt would not see Mrs. Throckmorton, Sr.,
166 and that he gave witness orders not to bring her name to his room; to which testimony and to each and every part thereof the caveatees separately objected, upon the ground that testimony as to relations between said Joseph Holt and the said Mrs. Throckmorton, Sr., was not admissible upon the question of the genuineness of the will and as against any of the caveatees; that testimony as to such relations nearly or quite ten years after its date was incompetent and inadmissible upon the question of genuineness, and that said testimony was incompetent as to any of the other issues in the cause, revocation, if any there was, not being provable in that manner under the rules of law; but the court overruled the said objections and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and the said exception was duly noted at the time upon the minutes of the court, and it was thereupon stipulated between counsel for the respective parties, with the concurrence of the court, that all other testimony in the cause admitted by the court should be subject to the like objection and exception without reiteration of the same; and thereupon, subject to the said objection and exception, the caveators introduced testimony tending to prove that Mrs. Throckmorton, Sr., on several occasions sent flowers and fruit to Joseph Holt, who refused to receive them and sent them back; that subsequently to 1890, about the time of the court-martial, the said Joseph Holt declared that the Throckmortons were his enemies and that he did not wish to see them; that subsequently to 1892, at or

about the time Major Charles B. Throckmorton had been tried before a court-martial in New York, the said Joseph Holt said on two or more occasions that he was a scoundrel, and that he had gotten him out of difficulties before those resulting in his court-martial.

The witnesses George A. Johnson and Charles Strothers further testified that they had never heard Joseph Holt speak of Josephine H. Throckmorton, and the witness Martha Scott that she had never heard him speak of her unkindly.

167 Thereupon GEORGE A. JOHNSON, a witness produced on behalf of the caveators, testified that he was coachman for the testator from February, 1878, until December, 1884.

168 And thereupon, against the objection of the caveatees, on the ground that such testimony threw no light upon the execution of the paper-writing of February 7, 1873; that it was incompetent to offer such testimony upon the question of revocation, because revocation could not be established by proof of any change of relations or feeling between the testator and the beneficiaries or any of them subsequent to the execution of the will; and upon the further ground that a subsequent change of relations or feeling between the testator and the grandmother of Miss Josephine Throckmorton or of transactions between them could not be received as against any party to the suit, all of which objections were overruled by the court, said witness further testified that in the early part of his said employment Mrs. Throckmorton, Sr., and grandmother of Miss Josephine Throckmorton used to visit the testator and was upon very friendly relations with him; that he used to place his carriage at her disposal and have witness drive her whenever and wherever she wished to go, but that about 1880, on testator's return from a visit to Kentucky, he went to call upon Mrs. Throckmorton, Sr., and returning told witness never to allow her on his premises; that she thereafter called repeatedly, as often as once or twice a week for six or eight months, at said Joseph Holt's house, who said he would not see her; that witness told her on these occasions that testator was busy; that said Holt told witness afterwards that they were enemies of his; and subject to the said objection was interrogated and answered as follows:

Q. He said who were enemies of his?

Ans. Mrs. Throckmorton and her family, and he did not intend to see her or any of the rest of them.

Q. Who did he mean by them?

—. Mrs. Throckmorton.

Q. Or any of the rest of them?

Ans. Yes, sir.

Q. At the time the Judge said, "They are my enemies," had the children called?

A. They had.

And on cross-examination said witness testified that this conversation was at a time when witness told said Holt that Mrs. Throckmorton had called to see him; that she and the two children were

the only ones who called to see the said Holt after the quarrel, in so far as he remembered, and that when said Holt made said remark witness understood him to mean whoever was at the door. Said witness further testified on cross-examination that he found out in the house that the falling out was about Mrs. Washington Holt.

169 17*th Exc.*

And to the overruling of their said objections and to the admission of said testimony as to the relations with Mrs. Throckmorton after 1873 the caveatees then and there duly excepted, and said exception was duly noted at the time upon the minutes of the court.

Thereupon the said witness further testified that a year or two after the falling out he used to see Miss Josephine, who was then quite small; that she and her brother, who was a little boy, came to the testator's house; that testator said, "Tell them to go away;" that he would not see them; that witness told the children testator was busy; that they would play in the yard, eat apples and peaches, and go away; that Miss Josephine was then a little girl of twelve or fifteen years; that Miss Lizzie Hynes and her niece, Mrs. Ray, stopped at the house for a week or two on one occasion while witness was there; that testator made it as pleasant for them as it was possible to do; that he always spoke kindly of Miss Hynes, and that witness used to mail letters to her for him; that he does not remember taking Mr. Devlin's name to the testator nor hearing the testator speak of him; that he does not remember all the strangers who called.

170 Said witness, MARTHA SCOTT, further gave testimony tending to prove that Miss Josephine Throckmorton called at Joseph Holt's house about the year 1886 and remained about three-quarters of an hour with him in his parlor; that she went a second time about a year later; that Mrs. Washington Holt and her family were in the parlor, and Joseph Holt on that occasion saw her in his dining-room; that she called him *pere*, or something like that; that about the time of the court-martial she called again; witness took her name to Joseph Holt, who sent word he could not see her; that she then got the cook, Ellen Foster, to go up again and say she wished to see him for five minutes only, and that he then said he would see her for that length of time; that he was sick and in bed at the time, and she did not remain very long; that she called on another occasion when he was not at home, and that is the only occasion on which she called at the house, and that she never went there on two occasions, nor on any occasion accompanied by a white servant named Anna Tulley nor by any other person whomsoever.

As to Elizabeth Hynes, the testimony of the caveators tended to show that after 1873 she had visited Joseph Holt in Washington on several occasions, accompanied on two of them by her niece, Mrs. Mary McC. Ray; that she was always received and entertained

kindly and very affectionately by him; that they corresponded with each other by mail frequently; that the relations between them were those of unbroken kindness and affection until his death. The caveatee WASHINGTON D. HOLT testified that Joseph Holt informed him he had given Lizzie Hynes $10,000 in bonds; that she was a simple village woman, with simple ideas and inexpensive habits, and that the said sum was an abundance for her: that this
171 conversation took place shortly after the gift had been made, and Joseph Holt said he had given the bonds to her absolutely in order to make her relatives kind to her in the hope that they might inherit them at her death.

The caveators further offered evidence tending to prove that Joseph Holt stood high as a lawyer in Mississippi, and was on one side or the other in important cases, especially in criminal cases; that in 1862 he was appointed judge advocate general of the Army of the United States, and held that office until December 1, 1875; that the caveatee Luke Devlin was a messenger in the office at the time of his appointment, and continued a messenger until the year 1869, filling the ordinary duties of a messenger in a public office; that in 1869 said Devlin was promoted by the said Joseph Holt to the position of a first-class clerk in said office, and continued in said office until the retirement of the said Holt therefrom; that his duties were performed in a room separated from the room occupied by the judge advocate general by an intervening room, occupied by the chief clerk; that he did not come in contact with said Joseph Holt in the performance of his official duties; and Col. WINTHROP, one of said witnesses, testified that said Devlin's relations with Judge Holt were very friendly and kindly, but were those of a messenger, and that no social or business relations were observed between them between 1862 and February 7, 1873; that after Dec., 1875, said Devlin never visited said Holt, and that neither the servants nor the friends of the latter who were frequently with him ever saw them together after that date nor heard said Holt mention the name of said Devlin.

172 Thereupon, further to maintain the issues on their part joined, the caveators introduced as a witness on their behalf JOHN B. RANDOLPH, who testified that he had been for over thirty years employed in the office of the Secretary of War, including in his period of service the time when U. S. Grant and William T. Sherman were Secretaries of War and while the said William T. Sherman was General of the Army; that he was perfectly familiar with their signatures and had recently examined them; that the signature of General Sherman was a passably good imitation and that of the said Grant as a witness to the will was a very poor imitation of his signature, in witness' opinion, and that, in his opinion, neither signature was genuine, and, upon cross-examination, that during the war General Grant wrote the word "Grant" with a plain dash over the "t," a small signature; that the word "Grant" had an upward tendency, while he wrote it very nearly straight, and that when older he wrote a bolder signature, with a flourish over the "t," in 99 times out of 100, and the "t" was of a more pro-

nounced character; that the "U" was smaller than in his signature between 1871 and 1875 and the "U. S." longer, and that both the upstroke and the downstroke in the letter "S" slanted more than in his genuine signatures; that in the genuine signature of General Sherman, in the long quirl to the capital "T," the upper and lower line met; witness never saw one in which they did not meet, and he had seen thousands of them; that in the signature "Sherman" General Sherman made the final quirl below the name straight back without any tremor or appearance of nervousness; that there was no tremor in any of the lines as in the signature to the will; that, in his opinion, the said signature to the will was not in the handwriting of General Sherman, and that witness' reasons for so thinking were the formation of the letter "T" and the said tremor; that in his genuine signature the General carried the loop in the word "Sherman" down; that the "S" in said word differed also
173 from the genuine "S," as witness recalled it, in the little stroke at the lower part of said "S" where the upward stroke crosses the staff; that it should not make so much — a loop nor so pronounced a loop as in the will.

Said witness, on further cross-examination, testified as follows:

Q. I understand you to say that in these long lines, whether in the stroke above the "t" or in this sweep below the name "Sherman" in the genuine signatures, there is no sign of tremor?

A. No, sir.

Q. Do you notice signs of any tremor there?

A. I do, sir.

Q. And that is one of the reasons that induces you to believe that that is not genuine, I take it?

A. That and the formation of the letter "t."

Q. What is the peculiarity about that?

A. I described that—it is the upward stroke there.

Q. That is, he continues the upward stroke of the "W" and makes the top of the "T" with it?

A. Yes, sir; that is it exactly.

Q. And, in your observation and experience, the upper line in that upward stroke always touches the lower line?

A. Yes, sir; in four out of five.

Q. And there is no appearance in any signature that you have ever seen of any tremor?

A. No, sir.

174 & 175 Thereupon the caveators further produced as a witness in their behalf one J. O'T. McCarthy, who testified that he was an artist in handwriting; that he had seen two signatures of Mrs. Gen. Sherman in 1877, one of which was written in his presence; that he had compared these signatures together, and could not testify unless allowed to state the results of this comparison; that he had no impression about the genuineness of her signature except as he took her signature with papers in his possession and compared them with the name on the will; that his only means of forming an opinion was comparing the signatures in his

possession with the name on the will; that he had an impression upon his mind that he had brought the papers as a guide, for the purpose of making a comparison; that he had looked at the signatures in his possession, which he knew to be Mrs. Sherman's; had refreshed his mind by her signatures, and that there was a radical difference between the signatures he had and the signature on the will.

176 The caveators further introduced as a witness on their behalf CHARLES H. STROTHERS, a servant of Joseph Holt during the last years of his life, who testified that the eyesight of the said Joseph Holt during his latter years rendered him unable to write, and that witness and his wife wrote letters for him, which letters were identified; that he did not remember how said Holt commenced his letters to Miss Hynes, whether My dear friend or Dear Elizabeth or which, but that it was not "Lizzie," and that he never called her Lizzie in writing, to witness' remembrance. The
177 periods in the form of blind circles in said letters were witness' punctuation; that Luke Devlin called at witness' pool-room, near the B. & O. depot, shortly after the will was published in the newspapers, and said there was "a pretty little pile in it for" him; that witness thought Washington Holt was under the impression that witness destroyed the will; that witness burned up about twenty-five letters in the coal-scuttle in the yard a week or two after death of Joseph Holt, by direction of Sterett and Washington Holt, and saw some newspapers and circulars burned in the grate in said Holt's bed-room; could not say whether any letters burned there or not; that they were burned one chilly day to make a fire, and the fire was kept up with them; that Joseph Holt never burned anything and reproved witness for burning a spoiled check, telling him to burn nothing; that witness saw the alleged will in the register's office shortly after it was found, but had no prior knowledge; had had nothing to do with sending it in; that witness was put in charge of the property and lived there with his wife and mother ever since shortly after the death of said Joseph Holt; that he rented the stable and applied the rent money to his own purpose; that he paid no rent for his occupation of the property; that he used said stable for a wood and coal business and had himself lettered the same with signs relating to said wood and coal business and identified as correct certain photographs produced by the caveatees, showing said stable and lettering thereon; and thereupon the caveators rested.

178 Thereupon the caveatees, in rebuttal, offered testimony as follows:

Mrs. FANNIE RICKETTS, a witness on behalf of said caveatees, testified by deposition that she was a guest at a dinner given by said Joseph Holt in February, 1873, at which dinner President Grant, Mrs. Grant, and General and Mrs. Sherman were also present; which dinner was within a month of the second inauguration of President Grant; that Secretary of State Hamilton Fish, Mrs.

Fish, and three other persons, whose names witness did not recall, were present at said dinner; and in answer to the formal final interrogatory said witness further testified that she heard said Joseph Holt speak with bitterness of Mrs. Throckmorton, Sr., on two occasions some years subsequent to the said dinner, one of these occasions being a reception given to Secretary Blaine.

179 Thereupon ANNA TULLEY testified that she was a domestic in the service of Mrs. Throckmorton, Sr., in 1891; that Miss Josephine H. Throckmorton visited her; that on two occasions, when it was getting dark, Miss Josephine had witness accompany her to testator's house; that on the first of these occasions the colored girl said, after taking card up, that testator would see her in his room, and she went up, staying near an hour, witness remaining in the hall; that on this occasion testator came down with Miss Josephine to the door that leads to the porch, bade her good-bye affectionately, told her to come again; that he was always glad to see her; that on the second occasion the girl told Miss Josephine the testator was expecting her and to go right up to his room; that as Miss Josephine was leaving testator called her back, said he had forgotten something, handed her a little package out of his pocket, kissed her affectionately, and told her to give his love to her father, mother, and brother, who were then at Fort Schuyler; that
180 he was a smooth-shaven-faced gentleman, very old and feeble; that the girl was the witness Martha Scott, and that these visits were prior to 1892.

Thereupon the caveatees offered evidence tending to prove that Joseph Holt always manifested a kindly feeling towards Mr. Devlin while he was filling the position of messenger; that during that time he talked frequently about him; always regarded him as a faithful man and was very fond of him; that after he was messenger he spoke of him frequently and kindly; that on several occasions, when discharged from the position of enlisted service to that of a civilian clerk, said Joseph Holt wrote, unsolicited and unrequested, endorsements of him in the words and figures following:

181 "*Character.*

BUREAU OF MIL JUSTICE *Septe* 3*d* 1869.

The character of Luke Devlin while on duty in this bureau has been most excellent. He has been faithful & zealous, & has enjoyed my A. G. O. No. 98 fullest confidence.

J. HOLT,
Judge Adv. General.

"*Character*

BUREAU OF MIL. JUSTICE. *July* 23*d*, 1874.

Luke Devlin has been on duty in this Bureau some thirteen years, first as messenger, then as civilian clerk, & afterwards as enlisted into the general service & detailed here for clerical labor. His conduct throughout this long service has been most excellent.

Thoroughly qualified for his duties he has performed them at all times, with fidelity & zeal.

J. HOLT
Judge Adv General."

"*Character.*

BUREAU OF MIL. JUSTICE, *Feb'y 5th* 1868.

Private Luke Devlin during his enlistment has been on duty in this Bureau. His character is excellent, & the services incident to his position have been performed with zeal & fidelity.

J. HOLT,
Judg eAdv. General."

182 And that in the year 1867 the said Joseph Holt suggested to said Devlin to apply for a lieutenancy in the regular army and wrote a letter to the Secretary of War in his interest in the words and figures following:

" WAR DEPARTMENT, BUREAU OF MILITARY JUSTICE,
WASHINGTON, D. C., *March 26th*, 1867.

Hon. E. M. Stanton Secretary of War

SIR Learning that the name *Luke Devlin* is before you, on an application for appointment to a 2d Lieutenancy, I deem it but an act of justice to him to state that he is a young man of excellent character & conduct, who for some five years has been on duty in this office as messenger & also frequently performing clerical service, for which he is well qualified. He is faithful & capable, & well deserves the confidence, which has been constantly reposed in him.

Very respectfully
Your obt servt

J. HOLT,
Judge Adv General."

183 The caveatees further produced as witnesses Mrs. FRANK EVANS, Mrs. SARAH A. TERRY, employees of the register of wills' office, and HENRY W. SOHON, a member of the bar, who testified that they saw the alleged will on the day that it reached the register's office; that they examined it carefully, and that the lower fold at that time had not been separated from the rest of the paper; also Dr. WILLIAM M. GRAY, microscopist at the Medical Museum, who testified that he first saw the will in February or March, 1896; that he subsequently made enlarged photographs of it, produced and exhibited by him, to determine whether the lower fold had been separated from the rest of the paper, and that at the time of such photographing the separation was still incomplete, there being then still some fibers not torn apart.

Thereupon the caveatee LUKE DEVLIN gave evidence tending to prove that at the interview with Strothers, testified to by the latter, witness did not say there was "a pile" in the will for him, but that there was a high compliment; that he had not seen Miss Jose-

phine Throckmorton between the spring of 1887 and the month of October after the will was found; that he had no interviews or correspondence with her father or mother since 1887, and no interviews or communications with her grandmother since 1890, until after the finding of the will.

Thereupon ELIZABETH HYNES was recalled as a witness on behalf of the caveatees and gave testimony tending to show that she did not remember either her father or mother; that, at her earliest recollection, she was living with her uncle, Dr. Harrison, whose family consisted of himself, his second wife, his daughter Mary, who
184 afterwards became the first wife of Joseph Holt, and her said uncle's two sisters, Sarah Harrison and Fanny Harrison, who were named in the will of 1848; that witness' first cousin, Mary Harrison, took her in her care, and was always in the place of a mother to her as far back as she could remember; that she first knew Joseph Holt when he became engaged to Mary Harrison, witness being then about five years old; that he was always kind and affectionate to her; that she was always taught by her cousin Mary until the marriage of the latter, after which Joseph Holt sent her to school; that after the marriage said Holt told her he had promised her cousin that he should take witness and care for her as his little child, and that she was then his little girl; that he sent her to school, paying her school charges and expenses of every kind from the time of his marriage until the time of his death, except that she lived for some time with her married sister, the mother of Mrs. Ray, during which period her brother-in-law refused to permit her to pay any board; that Joseph Holt always supplied her abundantly with clothing and money, stating he wished to support her handsomely and desired her not to be sparing in her expenses; that her cousin died in 1846 and Joseph Holt married a Miss Wickliffe about 1850, often going to see her after his second marriage and sending for her to see and stay with him on his visits to his second wife's home in the vicinity; that his second wife died about 1860; that in 1861 he took her with him to Boston; he made his famous Tremont House speech while witness stood by his side, and that he then took her to Albany, New York city, Philadelphia, Niagara, and brought her back to her home in Kentucky; that the following year he took her with him
185 through Montreal, Quebec, Toronto, and other points, returning by Niagara Falls; that at Toronto she, at his request, as his representative, met a large number of people who tendered him a reception, he being too ill to meet them in person; that he took her some nine or ten times to Niagara, the last visit being, she thought, about 1885 or 1886, though she was not positive; that she visited him in Washington in 1861 and again in 1882 and 1884, and that she visited another friend in Washington on two occasions in 1884, on each of which occasions she was a great deal with said Holt, he visiting her, taking her driving, sight-seeing, and that she last visited him in 1891, when his health was very poor, but when he visited her; that he often spoke of Major Throckmorton,

his wife, daughter, and son, always affectionately and kindly; said the major was a man of principle and honor and a brave soldier during the war; said that he loved Josephine as his own child, and that she was very fond of him, often put her arms around his neck; that she had won his heart; that he sometimes called her "Josephine," sometimes "My child," sometimes "My namesake," and that he taught her to call him "Bon Pere;" that on the last visit to Niagara he purchased a picture of the falls and other presents for her; that Joseph Holt had told her the difficulty between Mrs. Throckmorton, Sr., and himself grew out of the fact that Mrs. Throckmorton had said that Major Throckmorton's wife had told her that witness' cousin, Florence Hynes, had told her that witness had received an affectionate letter from him, had ridiculed it, and called him an old fool, which story her cousin Florence and Mrs. Major Throckmorton had both denied; that he did not
186 believe Mrs. Major Throckmorton had made such a statement, and that he wished witness to think no more about it, and that in 1873 witness had no friends or acquaintances in Washington except Joseph Holt.

Said witness further testified that in the spring of 1884 Joseph Holt visited her at the house of Mrs. Ray, her niece; gave her $10,000 in District of Columbia 6% bonds, stating that he had on several occasions forgotten to send her money just when she needed it; that he did not wish her to confine herself to the income which the bonds yielded, but to write him for money whenever she wished more; that she did so write, and he sent her further moneys in checks, post-office orders, and money in envelopes; that in the summer of 1884, while visiting his house, he drew his chair up to hers, the day before her return to Kentucky, and said, "I want to talk with you; I have never talked to you seriously about this matter, but I want you to remember you are amply provided for besides the $10,000 I have given you;" that in reply to a question of hers as to what his relatives would think he answered that they had no right to object; that they were all independent of him and did not need it; that he had made his money with his own hands, and that he certainly had a right to do what he pleased with it. Said witness produced a letter, conceded by counsel for caveators to be in the handwriting of Joseph Holt, dated February 24, 1885, addressed to her as "My precious cousin," and containing, among other things, the following: "You cannot rejoice in your independence more than I do—I trust that it will be hereafter in my power to make you yet more so. I should be very wretched, indeed, if I thought you would ever be left to the tender mercies of the world, which in its selfishness, turns its back on the helpless, but is profuse in its offer of assistance to those who do not need it.
187 Have no fear—you are safe now, but will be safer in due time. Please read the papers I send you in regard to the dedication of the monument. They are very interesting & instructive. As ever, your devoted cousin."

Said witness further testified that on several other occasions said Joseph Holt again spoke to her about the $10,000 gift and said that

he had already provided amply for her besides that sum, the last of these conversations taking place in 1891.

On cross-examination said Elizabeth Hynes testified that, as a general thing, prior to the time when he gave her said bonds said Joseph Holt remitted her always $50 a month, and that if she needed more after that she would write to him for it; that the interest on the bonds amounted to $600 a year; that she did not think there was any change in the amount of money he sent her after he gave her the bonds; that he kept sending her pretty much the same amount. The witness' attention was then called to certain memorandum books, which she testified were in the handwriting of Joseph Holt and which contained entries in his handwriting from day to day from the year 1884 to December, 1891, of his expenses and cash paid out for all purposes. Being further cross-examined, the witness then said that she did not remember whether said Joseph Holt gave her any money between June, 1884, and April, 1885, but she thought he did; that she did not remember whether between the 23rd of April, 1885, when he gave her $30, and the month of July, 1887, he gave her in any way a dollar, but that he may have sent her money; that he gave her money whenever she met him, and that she did not know whether he did or did not give her money during that period; that her last trip with Joseph
188 Holt to Niagara Falls was in the summer time and was either in 1885 or 1886; that she thought that between July, 1887, when he paid her $50, and April, 1889, Joseph Holt had paid her some money, but would not be sure of it; that he always gave her money when she wanted it; that perhaps she wrote to him for it; she did not know; she could not be clear about it; that she could not say whether during the year 1889 he gave her more than $65, nor whether during the year 1891 he gave her more than $180.

Thereupon, by consent of counsel, the cross-examination of Elizabeth Hynes was suspended, and LEE M. LIPSCOMB, being examined as a witness in surrebuttal on behalf of the caveators, testified that he is employed in the office of the Auditor of the Treasury for the Post Office Department; that to that office money orders come from the different post-offices, and that he made an examination to see what money orders were sent to Lebanon, Ky., from Joseph Holt or J. Holt to Elizabeth Hynes between April, 1890, and August 31, 1894, and that the only such money orders on file were of the dates and amounts following:

July 2, 1889, $50.
October 3, 1890, $15.
March 21st, 1891, $50.
June 8, 1891, $30.
July 16, 1891, $50.
September 2, 1891, $50.
March 29, 1892, $50.
August 7th, 1892, $20.
September 19th, 1892, $20.
December 28, 1892, $50.

189 March 18, 1893, $25.
July 12, 1893, $30.
December 16, 1893, $25.

Thereupon said ELIZABETH HYNES, being recalled for further cross-examination, identified her signature "Elizabeth Hynes" to the receipts appended to said money orders, and she further testified on cross-examination that shortly prior to January 1, 1886, she, being then quite ill, wrote to said Joseph Holt that she wanted to dispose of what he had given her, and asked him if he would prepare a will for her; that thereupon he wrote a will for her and sent it to her, telling her to copy it in her own hand and return it to him for approval; that she thereupon returned to him both the will which he had prepared and the copy which she had made; that he kept the original and returned to her the copy; that she had executed that will and still has it; that she did not leave her niece, Mrs. Ray, anything by that will, because said Joseph Holt wrote the will in that way; that he said Mrs. Ray was married and had a husband, and the other two nieces of witness were young and had very little, and he wanted her to leave it to them, and that, as a matter of fact, the will which said Joseph Holt had so drawn for her left out Mrs. Ray and her family, and that said will was dated January 1, 1886. Thereupon, at the request of counsel for the caveators, the witness produced said will, and it was offered in evidence by counsel for the caveators, and is as follows:

"I Elizabeth Hynes, of Lebanon State of Kentucky knowing the uncertainty of life and the certainty of death, and being of sound mind and disposing memory do make and publish this my
190 last will and testament, hereby revoking all others made by me.

Being the owner of twenty bonds of five hundred dollars each issued by the district of Columbia on the first day of November eighteen hundred and seventy-two, payable thirty years after date and bearing six per cent interest, I hereby give and bequeath the said bonds to my two nieces, Lydia McChord and Lizzie McChord both at present of Lebanon Kentucky and direct that they shall be equally divided between them on my death by my executor. Said bonds are now deposited with the Fidelity Trust and Safety Vault Company in the city of Louisville, Kentucky.

As my other niece, Mrs. Mary Ray is married and so her life is provided for I do not deem it necessary or proper that she should share in the division of my property before made between her two younger sisters, whose means are extremely limited and who will greatly need assistance I propose giving them.

I appoint as executor of my last will and testament, with full power to carry the same into effect, R. H. Rountree esq of Lebanon Kentucky.

In testimony of the aforesaid last will and testament which has been written wholly by my own hand, I hereinto subscribe my name this the first day of January, eighteen hundred and eighty-six.

ELIZABETH HYNES."

On redirect examination the witness testified that her last visit to Niagara Falls with Joseph Holt was after he gave her the $10,000 in bonds; that after he gave her those bonds hardly six months passed without he would give her money or send it to her.

191 And thereupon the caveatees produced as a witness in their behalf Mrs. MARY MCCHORD RAY, who testified that she is a niece of Elizabeth Hynes; that Joseph Holt used to take Miss Hynes on long trips to Niagara Falls and other places and would visit her in Kentucky; that in 1884 he visited Miss Hynes there, at witness' house, and gave her $10,000 in bonds, stating that he had forgotten to send money with regularity; that he did not wish her to think that was all he intended to give her, but she was to write to him whenever she wished more money; that he had always tried to treat her as a child of a father who had plenty of money; had promised his wife to do so and expected to continue to do so as long as he lived; that there was plenty for both himself and her, and when he died he expected to leave her independent of everybody.

Said witness further gave testimony tending to prove that in 1882 Joseph Holt told her that his first wife's father had been the guardian of the said Lizzie Hynes and in some way had lost her property; that his wife before their marriage had been in charge of Lizzie, and said Holt had promised upon their marriage to take and care for her, and that upon her death-bed she had asked and received a promise from him always to take care of Lizzie, and that he intended to treat her as if she were his own daughter. Said witness further testified that she and her said aunt visited Joseph Holt in the summer of 1884, shortly after the gift of the $10,000 bonds; that he was unwell during the greater part of their visit, and that before they left he said to her aunt, in her presence, that

192 he wished to talk with her; that he did not know whether he should ever see her again or not; that he wished her to know the $10,000 was not all he expected to give her, and that he had fixed his business affairs in such a way that when he was dead she would be abundantly provided for, and that she should feel safe, and that at this interview, in reply to some reference by her aunt to his relatives, the said Joseph Holt replied that he had made his own money; that they were independent of him, and that they would have nothing to say. Said witness further testified on cross-examination that in this conversation in regard to his relatives his tone was not that of unkindness; that he said nothing further as to the disposition of his property; that Miss Hynes' nearest relatives are the witness, her two sisters, and five brothers; that witness had never had an unpleasant word, by letter or otherwise, with Joseph Holt, and that at her request he had loaned her husband $4,000, which money was subsequently collected by legal process through Mr. Washington Holt.

193 & 194 The witness was thereupon shown by the caveators a paper found among the papers of the testator after his

death purporting to be a copy of a letter written by him to her said husband on the 11th day of January, 1886, who testified that the said paper-writing and the endorsements thereon appeared to be in the handwriting of the testator, but that she had never seen such a letter and did not know whether her husband received such a letter or not; and thereupon the caveators offered the said paper-writing in evidence; to the admission of which the caveatees objected, first, upon the grounds stated in the preceding exception, and, in addition thereto, upon the ground that the said letter relates to a controversy between the testator and witness' husband, who is not a party to the suit nor connected by blood with any party to the same, and upon the ground that the said paper-writing and the controversy to which it relates are collateral, remote, and inadmissible; but the court overruled said objections and held that
195 the said paper-writing was admissible upon the question whether or not, under all the circumstances, the testator would have allowed such a will as that in controversy to stand under the possibility that some portion of the property which would pass thereunder might ultimately go to the said Nicholas Ray.

20th Exc.

And the caveatees then and there duly excepted to the ruling of the court in admitting the said letter in evidence, and the said exception was noted at the time upon the minutes of the court.

The said paper-writing was thereupon read in evidence as follows:

WASHINGTON *Jany* 11*th*, 1886.

Mr. Nick Ray,

SIR. In your brief letter of the 10th ult. you said "you certainly shall not lose anything by me & your money shall all be paid with interest." There was a time when this language would have afforded encouragement, but, in view of your *acts*, which speak much louder than your words—it seems little less than a mockery. I now learn from Mr. Roundtree, that after having promised to pay him $2,000, and thus take up your note for $4,000, within thirty days, you have wholly failed to do so, & have offered no reason for or explanation of this deliberate breach of faith while this has not at all surprised me, it must be confessed that I am at a loss to conjecture any decent excuse for your having practiced on Mr. Roundtree a deception, at once so senseless & so gratuitously insult-
196 ing. You have thus declared in effect, that you do not regard your note as worth taking up, & have intended perhaps to let me know in this unmistakable manner the ultimate fate of the loan—a fate which, in all likelihood, was foreseen & determined upon from the beginning. Under the generous proposal made to you, I offered to submit to a loss of $2,000, for having in good faith endeavored to serve you, which you would have been a clear gainer of $2,000, on the *same* operation—thus assuring to you a margin of profit on the transaction, which it was thought could

hardly fall below your expectations. Whatever depreciation your note has suffered, is due solely to your *own* conduce, of which, I will now speak with entire frankness.

This money was loaned to you with a distinct understanding that it was to be employed in establishing you as a partner in a mercantile firm then being formed & with the further understanding that you were with this capital to continue in mercantil- life, for which you were believed to be well qualified. This intimate association of the partnership with the loan, is sufficiently indicated, by the terms of the note itself, which is payable on the expiration of the partnership, being five years from its date. There was no personal security, but as the mercantile business is not a speculative or stock gambling one, I felt in view of this, & of your experience and qualifications, that I had a reasonable guaranty for the return of the money. Had it been said that the funds would or might be diverted into some other & indefinite enterprise or investment, I would unhesitatingly have refused to make the loan, because I was not in a condition, financially, which would have justified
197 me in running any such risk. After fully, by your letters, recognizing the interest this condition of things gave me in your firm, & after giving me an account of how you were getting on & promising to report further "after taking stock"—which you never did—you, some months afterwards, without consulting me or giving me the slightest notice, dissolved the partnership, gave to the funds an unknown direction, and withdrew yourself from mercantile life—thus cutting up by the roots the only guaranty I had for the payment of the money or the interest accruing upon it. This was in deliberate violation of the trust involved in the loan, & was done not only without notice to me, as I have said, but you have carefully refrained from that time, from writing me a single line, explanatory or otherwise, in regard to the unexpected & extraordinary course you have pursued. After having broken up and abandoned the business for which, and for which alone the money had been committed to your hands, you should, as a man of honor, have returned it at once or at least have consulted with me as to the disposition to be made of it, instead of endeavoring to conceal from me what you had done. More than this, when Mary, realizing how much my interests were concerned, in what you were doing, wished to write to me, you prevented her from doing so, saying that you would write yourself, and afterwards saying again and again that you had written, which you well know you had neither done or intended to do. Thus I have been and am still left by you in profound ignorance of the grounds of your actions, of all its details, and notably, ignorant of the purposes to which the money has been applied. This is very significant.

198 To such an extreme did this reticent and secretive policy proceed on your part, that, when on the fourth day of November last, I wrote you, asking whether you intended paying the October interest (then in default) on your note, and referring to what you had done—of which some account had reached me, through a reliable channel, claimed an immediate reply, you treated my

letter—for which I hold your receipt, with silent contempt in shameless disregard. I will not say of the courtesies only, but of the decencies even of social and business correspondence. This treatment is the return made me, for having, at some sacrifice, sold bonds on the interest of which I was in part living, in order to raise the money, which, without exacting security was advanced to you in the hope that with diminished and less arduous labors your enfeebled health, so feelingly portrayed by your wife, would be strengthened and restored. Of course I should be idiotic not to comprehend, which I do perfectly, both the animus and the consciousness, which have prompted a course so persistently secretive as necessarily to suggest methods which shrink from the light. This whole affair has proved for me a most mortifying revelation of yourself and affords a saddening glimpse of the downgrade on which your life has entered.

The long extension of the loan, after the security, which was looked to for its payment, has been swept away, which is the result of the blind confidence I was led to repose in you, gives you a great legal advantage over me, which you doubtless appreciate at its just value. Recognizing myself the legal advantage thus gained
199 by you, I do not address you now with any thought of bettering my condition, but solely to let you know, in the most emphatic manner, that you are thoroughly understood.

Yours, &c.

J. HOLT.

(Endorsement as follows:)

The original of this letter was this day mailed in a registered envelope for Nick Ray.

(Signed) J. HOLT.

Jan. 11th, 1886.

(In pencil:)

No reply recd.
J. H.

200 & 201 And in connection with said letter and against the said objection and exception of the caveatees the caveators offered, and the court admitted, a paper purporting to be a promissory note for $4,000, dated October 1, 1884, signed by the witness' husband, with endorsements thereon purporting to be signed by said Joseph Holt, the endorsements on which note the witness testified were, in her opinion, in the handwriting of said Joseph Holt. The said note and endorsements were as follows:

LEBANON, KY.

$4,000.00.

Five years after date I promise to pay to Joseph Holt four thousand dollars for cash loaned, with six per cent interest from date. Interest payable semi-annually, the first of each April and October.
October 1st, 1884.

(Signed) NICK RAY, JR.

(Endorsements as follows:)

The six months interest $120 accruing 1st April, 1885, has been paid.

(Signed) J. HOLT.

Decr. 1885. The six months interest due 1st October, 1885, $120 has been paid.

(Signed) J. HOLT.

Nove. 25th, 1885. Original of this note sent to R. H. Rountree, Esq., Lebanon, Ky. for professional action.

(Signed) J. HOLT.

The original of this note having been returned to me, was again, on this day, 11th Sept., 1886, sent again to Mr. Rountree for the collection of the April & October, 1886 installments of interest.

(Signed) J. HOLT.

202 The caveatees thereupon examined as a witness in their behalf HARRISON B. HODGES, who testified that he was a chemist, an expert in inks, having been consulting and analytical chemist for Carter's ink firm and in charge of the labaratory of quanti-ative analysis and lecturer on industrial chemistry at Harvard University; that archil is supposed to be known as a dye as far back as the time of the Greeks and Romans, but is not used in the manufacture of black inks or as an adulterant, it being far more costly than the aniline dyes and making a far inferior ink because a recognized fugitive and fading rapidly; that the aniline or coal-tar colors were introduced in 1856 and have since been used almost exclusively except for calico printing, blue dyeing, and the like; that it is impossible to determine whether a writing ink contains archil or to justify any definite statement as to its composition from the mere application of the liquid professed to have been used by the expert Carvalho, namely, muriate or chloride of tin, but that the application, first, of hydrochloric, sulphuric, or dilute acid, and then a solution of a ferro-cyanide of potassium, would produce Prussian blue if the ink were an iron ink, or a reddish tinge if it were a logwood ink. Whereupon the said Hodges, in the presence of the court and jury, applied the said chemicals to portions of the writing on the alleged will, producing a blue color, and thereupon testified that the ink was an iron or nut-gall ink, and that there was nothing about it whatever to indicate that it contained archil, and, further, that the indications were that inks made within the last fifteen years would contain aniline blue, it having been known to be a very valuable ingredient in inks, but that no trace of it was discoverable from his said experiments.

203 Thereupon the caveatees produced as expert witnesses on their behalf EDWIN B. HAY and WILLIAM E. HAGAN, who gave testimony tending to prove that the same hand which wrote the letters of Joseph Holt which had been put in evidence by the caveators and caveatees wrote the will; that there was no evidence of simu-

lation or to indicate that the writing of the will had been done hesitatingly or slowly; that it was written free and without effort, and that, after having examined every line and letter of the will in the text and signature, it was not a traced writing, and that there was no indication in any of them of tracing; that there was no evidence of "ageing;" that the letter was written upon paper made entirely of rags and of a kind which had been in use for thirty or forty years; that where ironing has been resorted to to give an appearance of age the appearance of the ironing remains under microscopic examination, for the reason that the fibers of the paper follow the direction in which the iron was moved, and that upon microscopic examination of the will no such appearance at all existed.

The said witness, Hagan, further testified that he had served an apprenticeship to a manufacturing chemist engaged in the business of manufacturing inks and had charge of the manufactory from 1845 to 1849; that he had since made repeated examinations of inks and had continued his acquaintance with their manufacture; that archil was used in said manufacture as far back as 1848, but had long ago been replaced by aniline colors; archil inks had not been sold in this country, to witness' knowledge, for twenty-five years; that the bleaching of ink by muriate of tin would not
204 show the presence of archil, and that it was impossible to detect its presence in that way; that archil inks fade and are not permanent; are destroyed by frost; that archil is much more expensive than aniline dyes, and that the latter are superior in all their qualities for the manufacture of inks.

Said witness further gave testimony tending to prove that the person who wrote the signature "Ellen B. E. Sherman" did not write the body of the will; that there was not a word in the will written with a pen pressure approaching the penmanship of that signature; which signature is in the conventional copy-book form.

On cross-examination said witness, Hagan, admitted that a skilled expert could imitate the handwriting of another so that an ordinary observer could not detect the difference unless it was explained to him and shown to him under a miscroscope, and that the science of forgery had got down so far that it takes an expert, with his miscroscope, to detect it when it is well done.

The said witness, Hagan, further gave testimony tending to prove that they had examined the lettering upon the Holt stable testified to by the witness Strothers as having been done by himself, and also the letters introduced in evidence as having been written by Strothers as amanuensis for the said Holt, and that he had further examined the photographs of the lettering on said stable which had been introduced in evidence and identified by said Strothers as photographs of the stable and his lettering thereon; that where lettering is photographed of a smaller size, but the proportions are maintained, such photographs afford a fair basis of comparison, and he had compared said lettering and writing with the envelope in which the will had been forwarded to the register of wills; that there were striking points of resemblance between the lettering and punctuation in question on the stable, on the envelope, and in the

letters so written by said Strothers as amanuensis, and that, in his opinion, all of said writing and lettering had been done by the same hand.

205 Said witnesses further testified that they had examined, both under the microscope and otherwise, the alleged will in January, 1896, and that the fibers between the lower third and the upper two-thirds of the said paper-writing were then interlaced and had never been separated.

206 On his cross-examination said Hagan further testified, when asked whether he could find among the signatures which were admitted to be genuine one in which the "J" was in all respects like the one to the signature in controversy, that he had not looked except while on the stand, but that he could not find it; that no man writes a letter twice exactly alike, of course; that the question called for something he could not find; that a man cannot write the "J" which begins his name twice exactly alike in every respect; that he can write twice alike in those respects which give it character, but, in witness' opinion, it was impossible to write exactly alike in all respects: that if witness should find two words exactly alike in different papers he would think that one was a tracing of the other or they were both from the same original; that in a book, of which witness was the author, he had shown that the so-called Morey letter was a forgery because the "Ja" in the signature "James A. Garfield" to that letter corresponded exactly with the "Ja" in the word "January" in the date of the letter; that those two "Ja's" being alike showed that they were from the same original; that in said book occurs the following paragraph:

"Where two signatures of the same person exactly coincide, when one is laid over the other in parallel arrangement, with a strong light behind them, this condition of their appearance is very positive evidence that one of them is traced from the other and is a forgery, as it is impossible for such a circumstance to occur in the writing of two signatures produced habitually.

"In the Sylvania Ann Howland case there were found to occur, as added to a will, three codicils, each of which had affixed thereto what purported to be the signature of the testator, and which three signatures, when examined as transparencies, were found to coincide in all respects as to form and general appearance. A calculation was made by Professor Pierce, a learned and well-known mathematician of his day, as to how often it was possible for such a circumstance to happen with habitually produced signatures. He gave it as his opinion from actual calculation it could only happen once in two trillion eight hundred and sisty-six billion times."

207 The witness said, on further cross-examination, that he agreed with Professor Pierce in this matter in a general sense, but could not follow him into billions and trillions; that in writing other words they would vary more from each other than the signature, because the writing of the signature is purely a mechanical act; that if he found in the body of a letter, for instance, two words alike of reasonable length—not short words like "to" or "the"—he would say they were traced from each other or one from the

other, and that the way to go to work to find that out would be to examine them with transparencies by the use of sunlight, and that the best way was to use the transparencies, and then to measure them with the compasses.

And thereupon, upon further cross-examination, the witness testified that, after comparing certain words in the will with the same words in the letters of Joseph Holt dated Feb. 7th, 1873, and Sept. 29th, 1873, which had been introduced in evidence by the caveatees, with the aid of a gelatine fac-simile of the will, in transparency, produced by the caveators, the witness testified that he was still of the opinion that the hand which wrote the letter admitted to be genuine also wrote the will, and that he found in the said admittedly genuine letters reproduction of the same words in fac-simile in a number of instances, not only in small words, but in long words, which he had never known to occur in the writing of anybody else—the almost exact reproduction of the same words in the same style, measurement, length, breadth, and depth, to an approximation as close as those in the letters of Feb. 7th and Sept. 29th, 1873.

208 Thereupon the caveatees recalled the witness P. TECUMSEH SHERMAN and offered the said witness in rebuttal of the testimony of the witness John B. Randolph as follows:

By Mr. DARLINGTON:

Q. I want to ask you about some alleged peculiarities in your father's signature.

Mr. WORTHINGTON: I object to any examination of any one in rebuttal about the signatures to that paper. That matter is foreclosed or else we were very much deceived in the situation.

Mr. DARLINGTON: On yesterday, as your honor will doubtless remember, a gentleman was called to testify upon the question of the genuineness of the signatures of Gen. Sherman and Gen. Grant to this paper, and he testified that they are not genuine because of alleged peculiarities in them. There is a kind of flourish, or what he has called a quirl, over the "T" in the signature "Sherman," and the witness testified that invariably those two lines met at a certain point, and that they were never distinct and separate.

The COURT: So far as he had observed.

Mr. DARLINGTON: He said he had seen thousands of them and never an instance where it happened. We want to rebut that and show this is not an unusual feature in his signature.

The COURT: How is that rebutting evidence?

Mr. DARLINGTON: When Mr. Sherman was on the stand he was not asked anything about peculiarities of that sort; he was simply asked whether that was his father's signature, and he said it
209 was. Of course, we could not have anticipated any such objection as this. When particular points of difference are pointed out it seems to me that we are very clearly entitled to show that those points were not peculiarities and are not indications of

forgery. They are points which could not have been anticipated and which were not gone into at all by our witnesses, but were introduced afterwards. I scarcely see what feature of rebutting testimony they lack.

Mr. WORTHINGTON: Your honor will remember that in making their case and before they closed it, while not called upon to do so, yet we stated that we understood that every piece of evidence which counsel on the other side expected to offer in support of handwriting in this paper, and that it was executed by Judge Holt, would, in our view, have to be put in in the first instance. We notified them twice about it, and your honor gave them notice, after they had closed what they thought was a *prima facie* case, that your honor agreed with us on that subject. They put upon the stand but one witness, as I remember it, to each of these signatures. This gentleman testified as to his mother's signature, Senator Sherman testified as to his brother's signature, and Mr. Grant testified as to his father's signature.

Mr. LEE: Senator Sherman also identified the signature of Mrs. Sherman.

Mr. WORTHINGTON: However that may be, the case was left mainly upon the question of the handwriting of the will. We have simply offered one witness as to each of these signatures. Now, if it is proposed to again go into this question as to the genuineness of those signatures your honor will perceive
210 that it reopens the whole case as to the whole will, because it is all claimed to have been originally one piece of paper. To say that when we call a witness to testify that in his opinion this is not the genuine signature of Gen. Sherman or of Gen. Grant, and they on cross-examination ask him to point out some differences and he does point out differences as to that signature and says that he has never seen a signature that contained some of the features which appear in this—to say that is rebuttal is quite remarkable. If they had brought somebody here to say that he was not telling the truth about it or was mistaken about it and had seen some signatures that had these peculiarities it might be worth talking about, but we would still say that was not rebuttal; but to bring in a witness here who says that he has seen other signatures besides those which the witness saw and has found certain peculiarities in them it seems to me clearly is not rebuttal testimony.

Mr. DARLINGTON: I want to show your honor just what we want.

The COURT: I think I understand what you want, Mr. Darlington.

Mr. DARLINGTON: The point I am making about it is that it was utterly impossible for anybody who did not possess omniscience to know that there would be a claim that the return line of that curve touched the lower line in the genuine signature of Gen. Sherman; that is a matter that could not have been anticipated. What I understand rebuttal evidence to be is evidence to meet those points which are introduced by way of denial of the case-in-chief which could not have been anticipated.

211 The COURT: You state the rule, I think, correctly; but the difficulty is in the application of the rule to the peculiar cir-

cumstances which you are attempting to define. The subject of the handwriting of these witnesses and its genuineness and the genuineness of these signatures was gone into, and the court required that the subject should be exhausted in the case-in-chief, because the very fact that was sought to be established at that time was the execution of this instrument. That execution was sought to be established in two ways—the witnesses being dead, by the proof of the genuineness of their signatures, and, secondly, by testimony indicating or tending to indicate the genuineness of the signature of the testator. Those witnesses who testified as to the genuineness of the signature were examined and cross-examined and gave their opinion as to each signature; that made the case-in-chief.

Now, the caveators in making out their case as a part of it have attempted to meet that evidence by witnesses, so far as the signatures of these witnesses are concerned, who claim to have some knowledge of the signature- of Gen. Sherman and his wife and the signature of Gen. Grant. Those witnesses, whatever their reasons may have been and upon whatever basis the judgment of genuineness or non-genuineness rested, gave eventually an opinion just as the witnesses for the caveatees have done. The witnesses who were examined in chief gave an opinion as to the genuineness of these signatures. Those who were examined in behalf of the caveators gave their opinion as to this question of genuineness or non-genuineness. Either upon the direct examination of these wit-
212 nesses or upon their cross-examination—I do not remember which, and it does not appear to me that it makes any difference—one or more of them gave the basis of the opinion formed, that opinion resting in part upon the familiarity with the signatures, derived from various sources. This particular witness to whom reference has been made said he acquired his familiarity by handling papers in the War Department and signatures to official papers. One of the reasons he gave why this signature, in his opinion, was not genuine was that he had never seen this peculiar feature. That was not a fact which he was testifying to, that the signature never was made in that way, but that, so far as his examination went, he had not seen it. The fact that he testified to, instead of being a fact in evidence, was the reason for his opinion. I do not think it would be competent to take the reasons given by the various witnesses for the opinion which they have formed and which they have expressed on the stand and attempt to controvert those reasons by what might be termed rebuttal evidence. It is not rebuttal evidence, in my judgment.

The objection will have to be sustained.

Mr. DARLINGTON: In order that there may be no difficulty in the record, I want to state that we propose to show by this witness that in the particular here mentioned, the return line of the curve or quirl, it was by no means an unusual feature in the signature of Gen. Sherman, and that it is frequently, if not habitually, found in his signature.

We reserve an exception to the ruling of the court.

I will ask another question of this witness, although, of course, the ruling covers it.

213 By Mr. DARLINGTON:

Q. In the "S" in the word "Sherman," in what purports to be your father's signature to that paper, you observe a loop at the bottom of the "S." I will ask you whether or not loops as large or as pronounced as that are usually found in your father's signature or otherwise.

Mr. WORTHINGTON: We object to that.
The COURT: The objection is sustained.

By Mr. DARLINGTON:

Q. I also ask you whether or not your father's signature was distinguished by the absence of tremor or whether there was a tremor in his signature.

Mr. WILSON: We object to that.
The COURT: The objection is sustained.

By Mr. DARLINGTON:

Q. I will also ask you, in the letter "S" in the signature "Sherman," where the upstroke crosses the downstroke, whether or not some enlargement of the lines there, or some thickness of them, is or is not a usual feature of your father's signature.

Mr. WORTHINGTON: We object to that.
Mr. DARLINGTON: On the same ground?
Mr. WORTHINGTON: On the same ground.
The COURT: That *it* is not rebuttal testimony and would not be competent, anyhow, in my judgment.
Mr. DARLINGTON: We reserve an exception to the ruling of the court on each of these questions.

21*st Exc.*

And to the said ruling of the court excluding the said testimony as not being competent in rebuttal the caveatees then and there duly excepted, and said exception was noted at
214 the time upon the minutes of the court.

Thereupon, in rebuttal of the witnesses produced on behalf of the caveators upon the question of the testator's style of composition, the caveatees offered as a witness on their behalf JOHN A. BINGHAM, who testified that he had been engaged in the practice of law for fifty years; had been in Congress sixteen years; was well acquainted with the testator from 1864 until the time of his death; was in official and intimate association with him during a protracted court-martial of the surgeon general of the Army of the United States, in which witness acted as judge advocate, and also while witness acted as special judge advocate in the trials growing out of the assassination of President Lincoln, in which trials the

testator acted as recorder; that he had papers submitted to him by the testator and in testator's handwriting for witness' consideration; that he had opportunities for learning the testator's attainments as a lawyer and otherwise; that witness frequently visited his house at his request and was very familiar with his writing; that he also had correspondence with the testator during witness' absence from the country as minister to Japan; and thereupon the following question was propounded to said witness:

Q. I wish you would examine the paper I now hand you, which purports to be the will of Judge Holt, and state whether, first, from your knowledge of his handwriting, the manner of composition, and general attainments, which we have gone into here, you are able to express an opinion as to whether that is in his handwriting, and, if so, whether it is or not, in your judgment.

215 Mr. WORTHINGTON: We object to that, first, so far as it relates to the question of handwriting, for reasons that I suppose are too obvious to require to be stated.

Mr. BUTTERWORTH: They are not so obvious to me; they may be to you.

Mr. WORTHINGTON: A number of witnesses were called here, and counsel were distinctly informed by the court that anything they had to offer on the question of handwriting they should offer when they opened their case. I now say that I object to so much of this question as refers in any way to an opinion based upon handwriting. Then I object to it further because it is not proper evidence in rebuttal, even when coupled with his style of expression, so to speak. That, however, is a separate and independent question.

Mr. BUTTERWORTH: I did not understand the court to decide that we were restricted in any event except as to the signatures in the will. The examinations were confined to the signatures in the will.

The COURT: I think you are mistaken about that. The handwriting of the body of the will was testified to by witnesses as being that of Judge Holt.

Mr. BUTTERWORTH: The witnesses called by the other side were examined not only concerning the chirography, but also as to the form of expression, the rhetoric, the forms of legal expression, and everything that goes to convey to the mind an impression about the genuineness of the document. I have coupled with my question as to chirography the other question which was propounded to the other witnesses, Major Winthrop and Col. Barr and Mrs. Briggs and Gen. King——

Mr. WORTHINGTON: Col. Barr was not allowed to answer it.

216 Mr. BUTTERWORTH: No; he was not allowed to answer as to the technical legal question, but as to an inspection of the paper, whether the composition, the mode of expression, the rhetoric, if you please, whether all those suggested to his mind, connected with the chirography, an opinion or whether he based his opinion upon all those. He said he did, and several of the witnesses, Mr.

King, Mrs. Briggs, and others, did the same thing. Hence I have put the question in that shape to Judge Bingham.

After argument:

The COURT: So far as an inquiry into handwriting is concerned, it seems to me to be very clear that it is not rebutting evidence. This controversy is one that is somewhat unusual. The execution of the will is controverted by one of the issues, and the caveatees necessarily assume the position of plaintiffs. In assuming the position of plaintiffs the caveatees necessarily assume the burden of proving the execution of this instrument. To prove the execution of the instrument, the three alleged witnesses being dead, proof of their handwriting, of their signatures, was offered, and then in addition to that proof of the handwriting of the testator, as to his signature, was offered and as to the body of the instrument itself, and that not by one witness as to each signature, but by a number of witnesses.

The caveatees, in the first instance, having offered evidence tending to prove the genuineness of the signatures of the alleged witnesses and having offered evidence tending to show the
217 genuineness of the alleged signature of the testator, then claimed to have made out a *prima facie* case, and the court ruled that having the burden of establishing the execution of this paper, having assumed it, the caveatees must exhaust that part of the case and offer such evidence as they saw fit as to the genuineness of the signatures and the body of the instrument, and that I understood was done. Now, the mere fact that some one or more of the witnesses examined in behalf of the caveators has based his or her opinion in part upon the composition of the instrument does not justify further inquiry into the handwriting of the instrument, based in part upon an opinion formed from the character or style of composition. After all, the opinion was an opinion of the genuineness of the handwriting, and that was all that was inquired into in behalf of the caveators. It was the genuineness of the handwriting, that opinion being based in part upon the peculiar characteristics, the chirography, and in part, as to some one or more of the witnesses, as to the composition.

This is clearly not rebuttal, so far as the inquiry relates to the handwriting, the body of the instrument, or the signatures of witnesses or of the testator. The objection is sustained.

Mr. DARLINGTON: I would like to call your honor's attention to one single witness, Col. Winthrop, who testified that his opinion was based upon the two together and he could not separate them; could not say how much was based on handwriting and how much on composition. Are we to have no opportunity of rebutting an opinion based upon the two things together?

* * * * * * *

218 The COURT: It seems to me that the question that was the subject of inquiry in behalf of the caveators was the genuineness of the handwriting. The fact that a witness based his opinion in part upon the composition does not justify the same inquiry

being put to a witness called in rebuttal. The subject of the handwriting of the witnesses of the testator and of the signatures and body of the instrument has been gone into in chief. I, at the outset, required the caveatees to exhaust that portion of their case.

The objection is sustained to that question.

Mr. BUTTERWORTH: We note an exception.

219 *22nd Exc.*

To the said ruling of the court in excluding the said question and not permitting the witness to answer the same the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the said witness was further interrogated as follows:

Q. You may state, if you please, whether your familiarity with the handwriting of Judge Holt and his general qualifications as a lawyer, his style of composition, manner and mode of expression, use of legal phrases and terms, is such as to enable you to form an opinion as to whether the paper you hold in your hand, which I have referred to, is in the handwriting of Judge Holt.

Objected to. Objection sustained and exception noted.

Mr. BUTTERWORTH: We want to call to the court's attention what the answer of the witness would be. I do not want the court above to say he might have answered it the other way.

Mr. DARLINGTON: We expect to prove by the witness that he is familiar with the handwriting, the style of expression, the legal qualifications and habits as to legal and other phraseology of Mr. Holt, and that he has an opinion upon the subject presented in the preceding question, and that in his opinion this paper carries with it inherent evidences of its genuineness upon consideration of all those points, or that there is nothing in the handwriting or in the handwriting and composition together to indicate that he was not the author of it.

That is overruled, and we note an exception.

220 The COURT: There is nothing for me to rule on. You say that is what you expect to prove. There is no offer to prove.

Mr. DARLINGTON: We offer to prove that by this witness if he is allowed to answer these questions.

The COURT: That offer is objected to?

Mr. WORTHINGTON: Certainly.

The COURT: The objection is sustained.

Mr. WORTHINGTON: The ground of the objection is that it is not competent evidence in rebuttal.

The COURT: I want it understood that this ruling does not apply, and I do not understand that it is the offer to introduce evidence tending to show the knowledge of the witness of the characteristics and attainments of the late Gen. Holt, what those characteristics and attainments were, independently of the instrument itself.

23d Exc.

To which ruling of the court in excluding the said question and not permitting said witness to answer the same the caveatees, by their counsel, then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon said witness further testified that he regarded the testator as a strong, sensible, careful, painstaking man, very faithful in the discharge of his duties; that witness never had any indication from the intercourse between them, from reading his papers, or from anything said in his conversation that he was a technical lawyer at all; there was no sign of any recourse to technical words in his papers at all; he dealt with facts and general principles.

221 Thereupon the caveatees offered as a witness on their behalf Major CHARLES B. THROCKMORTON, who testified that he first met Joseph Holt in 1858 at witness' father's house, when he was sixteen years old, and continued to know him ever afterward; that in 1859, when said Holt was Postmaster General, he appointed witness to a position under him; that when the war was threatened witness' father entered the Confederate army, but that witness, under the influence of Joseph Holt, entered the Union army, and was through the said influence appointed a second lieutenant; that said Holt corresponded with him throughout the war, encouraging and exhibiting an interest in him, and continued his correspondence after the war, their relations being of the most friendly character; that in 1863 witness married Miss Wickliffe, who was first cousin to said Holt's second wife, on which occasion said Holt endorsed witness most strongly to the Wickliffe family; that his first child, Josephine Holt Throckmorton, was named after Joseph Holt, who wrote, thanking witness, consented to act as godfather, sending a silver mug and a bottle of water which he had brought from the River Jordan for the christening; that while stationed near Washington from 1868 to 1872 he and his family were upon the most cordial and friendly relations with said Joseph Holt; that these relations were maintained through correspondence after 1872, when witness was on the Pacific coast and engaged in the Modoc campaign; that no difficulty ever took place between the said Holt and witness or the immediate family of the latter; that a misunderstanding did arise between the said Holt and witness' mother, who at the time of the trial was over eighty years of age and
222 feeble, both physically and in point of memory at times; that in the latter part of 1880 said Holt wrote witness that his said mother had informed him that witness' wife had said that Miss Lizzie Hynes had shown and ridiculed letters written to her by said Holt; whereupon both witness and his wife answered the said letter of Holt, and received from him in reply a letter in the words and figures following, which letter, dated in January, 1880, should have been January, 1881, having been received by witness in the latter year, while stationed at Fort Stevens, Oregon:

WASHINGTON *Jany* 12*th*, 1880.

MY DEAR MRS. MAJ. THROCKMORTON.

Nothing could induce me to refer to the repulsive matter of which you write, but the fact—sufficiently apparent from your lett-r of the 23d ult—that of what your mother heretofore communicated to me, but a small part has reached me, & that small part in such a shape as to make it impossible for you to comprehend it aright. The story, as given to me by your mother was not that

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letters, criticising them &c. but it was this—that years ago the Miss Hynes, cousin of Lizzie, told you that on a certain occasion Lizzie had read to them passages from one or more of my letters,
223 ridiculing them & calling me an "old fool" &c. because of certain terms of endearment they were alleged to contain. This was your mother's distinct statement as coming from yourself. I pronounced it false, stating that from my knowledge of Lizzie Hynes, she was incapable of such unworthy & ungrateful conduct, & further that no such words had ever been employed by me in any of my letters to her. I added that I would avail myself of the earliest opportunity

* * * * * * *

was brought to Lizzie's notice, she indignantly denied it; but within a few months, I have been able to make such an investigation, as to satisfy me beyond the possibility of doubt, that Lizzie never read or exhibited one of my letters to her cousin the Miss Hynes or made to them a disparaging or unkind remark in regard to me, but the contrary, I have now before me a letter from Miss Florence Hynes to this effect, & she adds that nothing but malignity could prompt such a statement.

* * * * * * *

I did denounce to your mother, as an outrage on my own sensibility, the circulation of such a calumny upon a lady to whom, as was well known, I held the relation of friend & protector, a relation constituted by her dying cousin who was my wife, more than thirty three years ago. I now realize that I should at once have made known to you this startling communication from your mother, & thus have afforded you an opportunity of denial or explanation, but the truth is, in view of the affectionate friendship I had borne
223½ you, I was so shocked that I could not trust myself to speak to you of it. The object of my last interview with your mother was simply to report to her the results of my investigations & to read to her some of the proofs which I hold, she did not claim that she had been in anything misunderstood in her statements nor could she have been.

I beg you will express my warmest thanks to the Major, for his very kind & most welcome letter. He has been my constant, true friend through many long & weary years. His friendship, always heartily reciprocated—has cheered & blessed me, & I am & shall

always be most grateful for it, as I am for your own words now before me.

Very sincerely yours

J. HOLT.

224 Said witness further testified that, although bitter towards Mrs. Throckmorton, Sr., after this incident, the said Holt never mentioned the matter to witness nor witness to him; that he continued to treat witness and his family with kindness, as before, and there was never any other difficulty that witness remembers; that this difference placed witness in a somewhat delicate position and, in consequence, he drew slightly away from the said Holt, seeing very little of him after 1885, but that they met occasionally and their relations were always pleasant.

On cross-examination said witness admitted having written and mailed to said Joseph Holt the following letter, found among the papers of said Holt after his death, and that the separation and misunderstanding mentioned in which letter was the difference between witness' mother and said Joseph Holt and the drawing apart between said Holt and witness which resulted therefrom:

225 "FT. SCHUYLER, N. Y., *Jany 2d*, 1891.

Hon. Joseph Holt,
Washington, D. C.

MY DEAR SIR.

After many years of separation, I again approach you for assistance. Will you give me a letter that I can lay before the Gen Court Martial, covering my entry into the army, such service as you may know, and any good words you may be willing to say for me.

You have been in the past the best friend I have ever had, and I have always loved and respected you as a friend and benefactor.

A terrible *misunderstanding* or *misrepresentation* has come between us, which I regret from the bottom of my heart.

I remain with the Greatest Respect,
Yours most sincerely

C. B. THROCKMORTON."

226 Said witness further testified that he had never had any difficulty, in the army or out of it, other than that out of which his court-martial grew; that with that exception he had never been arrested, reprimanded, censured, nor any charges of any kind made against him from his entrance in the army, in March, 1861, to his being placed upon the retired list, in 1894; that he saw the said Holt at the house of the latter in the early part of 1885 and spent quite a time with him; that he had no correspondence with him subsequently, but that the said Holt corresponded with witness' daughter; that the relations of the said Holt towards him were always pleasant when they met; that witness attended no reception at the White House between the first reception of President Hayes to the officers of the army and navy and the first reception

of President Cleveland; that he was not stationed in Washington and attended no reception during the administration of President Arthur; that his daughter accompanied him on the occasion of President Cleveland's reception, and that the incident testified to by the witness Mrs. Briggs—namely, the refusal of Joseph Holt to speak to witness and his turning his back upon him—did not in fact occur. Thereupon the said witness produced and they were admitted in evidence the following letters, all of which were conconceded to be in the handwriting of Joseph Holt:

227 & 228 WASHINGTON *Decr. 9th* 1876.

His Excellency
U. S. Grant,
President of the U. States,

SIR.

Having learned that in the contemplated reorganization of the signal corps, provision will probably be made for two officers with the rank of Major, I desire to unite with the other friends of Brvt. Major Charles B. Throckmorton 4th Artillery, in asking his appointment to one of these positions. He entered the army in March 1861 & though then but a youth he remained faithful to the flag, in despite of the remonstrances & importunities of his father, who sought to carry him with himself into the military service of the rebellion. From that time until the present I have been a close observer of his military career & believe that it
229 has been marked by ability, gallantry & an unflagging zeal under all the circumstances in which he has been placed. He served through the war & made for himself a most honorable record of duty performed. It may be mentioned that young as he was, he was placed in command of a battery at the first battle of Bull's Run & so conducted himself throughout that engagement, having saved his guns from capture by the enemy, as to gain the warm commendation of his commanding officer, as will be seen by reference to his report on file in the War Department. It is but due to him also to state that this service was rendered with a knowledge on his part that his father was then a rebel officer in the army confronting him & on which his battery was playing—a fact which gives to the service a character probably without a parallel in the history of the rebellion.

Major Throckmorton also served through the Modoc campaign, with distinguished honor & although the war with these fierce savages was not one of magnitude it involved service in the lava beds on the part of those engaged in it at once arduous, difficult & of extreme peril.

In view of this officer's record of service so patriotically & faithfully performed, & of his acknowledged qualifications for the duties of the position sought his appointment is respectfully but most earnestly recommended with full conviction on my part that he will do honor to the office should it be bestowed upon him.

Very respectfully
Your obt. servt,

J. HOLT.

230 WASHINGTON *Feby* 21*st* 1866.

MY DEAR COUSIN

The accompanying little watch was a gift from me to your cousin Margaret on the occasion of our visit to Geneva in the autumn of 1850. She wore it through all our wanderings & to the close of her life when she bequeathed it to my aunt Mary Ann Stephen to whom she was warmly attached. My dear old aunt in a letter to me accepting the offering said "When you hear that I am dead come & get the watch & give it to some one of Maggie's relations." She herself died a few months since & in presenting the watch to you I comply alike with the letter & spirit of her injunction & beg you to be assured that I have great pleasure in doing so. I trust that your young life may be spared to wear it through many long & sunny years, & I am sure that you will do so in some sympathy with the fond memories which for me cluster about it.

With kind regards to your excellent husband, I am

Sincerely yours

J. HOLT.

Mrs. Maj. Throckmorton
Detroit.

231 WASHINGTON *February 7th,* 1873.

MY DEAR COUSIN:

Your very sad letter of the 21st ult. has occasioned me much sorrow; not because I share the fears for Charlie's safety which are oppressing you, but because the picture of your grief & loneliness presented by you, which is continually before me, affect me more than I could express to you—Whatever may be the hardship of the military movement in which your dear husband is engaged,

231½ I am sure in the anxieties of your loving heart you greatly overestimate its peril. I am certain Charlie will return to you from it, not only safe but with increased honor in his profession and increased claims on the confidence and & devotion of his friends—and hereafter he will only be the dearer to you & you will be but the prouder of him for his having nobly done his duty.

You doubtless are already aware of the determination of the Government to engage in no further hostilities with the Indians, until all efforts at conciliation & peace have failed. That these efforts, made as they will be, in good faith & with a fixed purpose to do justice to the Indians, will be successful, I feel perfectly satisfied. You must be tranquil as you can and hopeful and have an abiding faith, that Charlie's life so precious to us all, and which so well deserves protection will receive it.

Your mother is very much worried with her apprehensions—Indeed she fairly took to her bed a few days ago, but is calmer and better now since she has learned the peaceful course which the govt. will endeavor to pursue.

Give my love to the dear little children and tell them that I think of them and love them always and am glad they are all escaping

the horrible ice and snow with which we have been frozen up this winter.

Wishing with all my heart, my dear cousin, that you may be speedily delivered from all the fears and sorrows now weighing upon your loving and true life, I remain as ever your affectionate cousin

J. HOLT.

232 WASHINGTON *September 29th*, 1873.

MY DEAR COUSIN.

I was very sorry to learn from your mother that my last letter—which was in reply to one from yourself—failed to reach you. It was plainly directed & deposited in the office with
233 my own hand, so that I cannot explain its loss. I am sure however you did not require the assurance which it bore to satisfy you of my continued, and affectionate remembrance of yourself and of the loved one- around you. Taking your mother yourself, & the Major together, you must as a family be regarded as, marvels of correspondence, which I fear, little prepares you for tolerating the shortcomings of others in that line—so I have not entitled myself to letters from either of you for a good while, I have been so fortunate as to hear of you & to be privileged to look into your precious little home circle, through your letters to your mother—& they have been to me a continual source of the greatest gratification. If I could only hear the bright joy of those dear little children my ears would have a peace which the saints cannot provide for them here.

Of course your mother has written to you how beautifully she has fitted up her house. It seems to afford her the sweetest satisfaction, but I think her chief happiness now consists in the contemplation of a visit to California which I am certain she will make this spring or summer. I believe a few -eeks passed among the love & endearment of your household—which seem to be her heart's continual home—would renew her life and lengthen both its years and its joys.

I was delighted to hear that the Major is reading law & think he cannot better employ his leisure moments—even if he should never practice it—which I am sure he could do successfully—the knowledge of legal principles thus acquired would hereafter be of the greatest advantage to him in his present profession. Your
233½ mother said he was reading Blackstone, which is a standard work of the highest character, & generally is the first study. After that I should think Kent's Commentaries would be the best work for him, but any lawyer in San Francisco, whose acquaintance he has made, can give him proper advice as to his course of reading. You must give my love to Josephine & Wickliffe and accept it abundantly for yourself & the Major, and believe me as ever

Your affectionate cousin

J. HOLT.

234 Said witness also offered in evidence, among others, the following letters, dated Washington, Oct. 4th, 1861: * * *

In view of the adverse influences which have assailed you, your loyalty, amid the demoralization & treason of the times is the brightest jewel of your professional life, & one which you cannot guard too carefully. With your father in the rebel army, & most of your relations pressing in the same direction, I feared that in the impulsiveness of your youth, you might not sufficiently reflect how sad an influence upon your professional reputation for fidelity to the flag might be excited by a word lightly and hastily or even jestingly spoken. I have no fears about the loyalty of your heart myself, but I am most anxious that even the most skeptical and distrustful shall have no occasion to doubt it.

I was gratified beyond measure at the mention of your gallant bearing on the field of Bull Run, which is found in the report of your commanding officer. You have only realized my anticipations, but I was delighted that you should so early have had an opportunity of vindicating the confidence reposed in you by your country.

235 WASHINGTON, *July* 16, 1863.

* * * * * * *

I have so much pride & pleasure that you still maintain your stand under the old flag, which, in the years to come, will give you & all who have defended it, a protection & a happiness which could be found no other where. All that I have heard of you has fulfilled my early expectations & has been to me a source of the highest gratification. As you have begun so I am sure, you will continue to the end—earnest, outspoken and heroic in your loyalty, & in your love of a country and government, every throb of life has teemed with blessings & honors for the American people.

236 WASHINGTON *August 5th* 1863.

Your record is without a stain, & my conviction is complete that it will grow brighter & brighter with the years that are to come.

I am glad you met Miss Hynes during your visit to Bardstown. She is in every way a noble spirited woman, but especially so in her love of country—loyalty is a sentiment which with her has the depth and fervor of religion itself.

Sincerely your friend,

J. HOLT.

236½ WASHINGTON *Sept 12th* 1866.

MY DEAR MAJOR.

I am in receipt of your kind note of the 8th inst. advising me of the birth of a little daughter in your home, & that you have honored me so far as to give her my name. I accept this as a great compliment from cousin Fannie & yourself, & as a recognition of one friendly relations which has deeply touched my heart & for which I am most grateful I congratulate you both on this bright accession to your household jewels, & trust that the young stranger,

growing in beauty & charm with her years, may in the future make you both glad even though all things else should make you sorrowful.

237 Thereupon the caveatee Miss JOSEPHINE HOLT THROCKMORTON gave testimony tending to prove that she was born in 1866, at Detroit; that from 1868 to 1872 she was with her father in forts near the city of Washington, where Joseph Holt used to visit them and where she first recollects him; that he saw her quite often and taught her to call him "Bon Pere;" that she frequently visited and stayed at his house; that he made her frequent presents of rings, dolls, and other toys; that she used to write him penciled letters, which he preserved and showed to her at his house as late as the fall of 1886; that the letters from Joseph Holt introduced by the caveatees were among a number of letters kept by her mother until 1890 in a packing box, and that in 1890, needing that packing box, her mother gave them to her; that she nailed them up in a smaller box, and that they remained in that box and in her possession, without being opened, until after the discovery of the will, when she opened the box to see what letters of her Bon Pere were among them, and that she sent them by her brother to her counsel in Washington; that he treated her with the greatest affection, made her many presents, including clothing and gifts of every description; that on her fifteenth birthday he gave her a watch and chain; that she was in school at Washington in 1881 and 1882, and then saw him constantly at his house and elsewhere; that there was not the slightest change in his bearing towards her, and that he gave her, during this period, a set of Dickens' works; that in 1882 or 1883 she joined her father at Fort Preble, in Maine, then at Newport, during which period she corresponded with said Joseph Holt; that she was in Washington from 1883 to 1885, visiting him twice a week or oftener; that he always greeted her with a kiss whether at his house or on the street, and treated her as if she were his own child; that from 1885 to 1888, her father being stationed at New Orleans, she spent the springs and winters there, but visited Washington and Northern points during the summers, meeting the said Holt and taking walks with him frequently on such occasions, and corresponding with him while at New
238 Orleans; that he gave her a set of mosaics in 1885, and a diamond ring on her birthday in 1887; that on all occasions, down to the last time she ever saw him, his manner and bearing was as it had been all her life; that on her return from California in 1882 she was in her 16th year, almost as large as now, was in Washington only from December to April, and that she and her brother were never on any occasion told that said Holt would not see her, nor did they pick apples, peaches, or other fruits in the yard, as testified to by the witness Johnson; that she was in Washington from January until April, 1891, during which period she saw said Holt, usually in his bed-room, his health then being very bad, and that he treated her with the same affection as he had done from her earliest recollection; that two of her visits during this

period were made about dark, and she was accompanied for that reason by the witness Anna Tulley; that on one of these visits he gave her a gold scent-bottle to replace one she had lost, which bottle she still possesses; that during the trouble growing out of her father's court-martial in the winter of 1892 she saw said Holt on two occasions, on one of which he advised her to get a letter of introduction to Vice-President Morton from Mr. C. G. Hinton, as a result of which advice she had a kindly interview with Mr. Morton; that on another occasion the servant Martha Scott told her said Holt was ill and could not see her, whereupon witness asked Ellen Foster, the cook, to tell said Holt she was there, who immediately came down, inviting her up to the room of said Holt, whom she found indisposed and lying in bed; that he then told her he did not see how it was possible that, with her father's record before them, a court-martial could have reached an adverse finding, and,
239 in reply to witness' apprehensions as to the future, in case the result of the said court-martial should be sustained, he said to her she should have no fear for the future; that he was an old man, then lying on the brink of his grave, but that he had provided for her, and that she would be perfectly independent; this was the last time she ever saw him, and that he never spoke to her at any time otherwise than kindly and with affection of her father and mother; that he told her at this last interview that her father's trouble was as much a distress to him as if he had been his own son.

Said witness further testified that in the summer of 1895 she had passed through Washington without stopping, going to Culpeper, Va., to visit relatives there; that she returned, passing through Washington, she thinks, on the 24th day of August, on which latter occasion she was in the city but an hour, awaiting her connecting train to New York; that on this latter occasion she met no one whom she knew in Washington and did not leave the station; that she reached Washington about two o'clock p. m. or a few minutes after, and the next New York train left, she thought, a few minutes after three o'clock p. m., and that after the death of the said Holt she first spoke to Mr. Justice Brown, of the Supreme Court of the United States, and subsequently wrote to Mr. Luke Devlin, whom she had known as a child, thinking from the conversations of the said Joseph Holt with her in 1892 that there must be a will.

Thereupon CHARLES WICKLIFFE THROCKMORTON, a witness on behalf of the caveatees, testified that he was a son of Major Charles B. Throckmorton and Mrs. Fannie W. Throckmorton; that he made his grandmother a visit in Washington in June, 1895, and
240 was not in said city again until August 30, 1895; that he first saw the will, on the last-named date, in the office of the register of wills, and that he had no knowledge who sent the will to the register's office.

Thereupon caveatees offered in evidence a letter without date or signature, but which was admitted to be in the handwriting of

Joseph Holt and which the testimony on behalf of the caveatees tended to show was written to Mrs. Throckmorton, Sr., and was enclosed with a letter from her to either her son, Maj. Charles B. Throckmorton, or Mrs. Fannie W. Throckmorton, under date of February 6, 1873, as follows:

EXHIBIT C. W. T. No. 1.

MY DEAR FRIEND

Lowrey did not call yesterday because of the inclemency of the weather. I hope he did not disappoint you. He went over in the forenoon of today, to offer you his services but you had already gone out.

I sent an invitation to Gen'l & Mrs Sherman today but fear that one or both will decline unhappily, it is the evening of Gen. Sherman's weekly reception, but I could not avoid this, because on no other evening of the week were Gen & Mrs Grant disengaged. It will spoil my arrangements completely, if the Sherman's decline. As the weather will prevent you from seeing Mrs. S., could you not address her a note this *evening* urging her to meet you at the dinner? If you can I will send it by Lowrey at once. Tomorrow may be too late.

I have already received the acceptance of Gen & Mrs Grant. You might mention to Mrs S—that they will be there—but you know best what to say.

Sincerely your friend.

Thereupon the caveatees rested.

241 Thereupon in surrebuttal the caveators introduced testimony tending to prove that said Joseph Holt kept little books in which he entered all his expenditures of every kind; that the last date on which the expense of a visit to Niagara occurred was in October, 1879, in connection with the initials E. H., apparently referring to Miss Hynes; that said book contains entries referring to visits to Holt's Bottom, one of said visits occurring in June, 1873, and others occurring annually or semi-annually from 1876 to 1888; said book contained entries of payments made to "E. H." from 1872 to 1888, in amounts varying from $380 to $750 for the years between 1873 to 1883, and from $25 to $250 for the years between 1884 to 1888; that the said book contains no entries of the names or initials of any member of the Throckmorton family; that the entries in said book relating to "E. H." for the year 1889 aggregated $85, for the year 1890, $105, and for the year 1891, $230; that there were entries in one of said books for every day in the month of February, 1873, and that the only entries during that month relating to the expenses of a dinner party were the following:

1873.

Feb'y 22. To Thomas Washington for himself & 3 others waiting on dinner yesterday... .... $12 00

Counsel for the caveators also put in evidence the following receipted bill, which it was admitted by counsel for the caveatees was found among the papers of said Joseph Holt after his death:

"WASHINGTON, D. C., *Feb.* —, 1873.

Hon. Judge Holt to John A. Gray, Dr.

Feb. 21st. Dinner for 17 person..... ..... $110 50

Rec'd payment,

JOHN A. GRAY."

242 Thereupon the said MARTHA SCOTT in surrebuttal was further interrogated on behalf of the caveators as follows:

Q. Did you hear the testimony of the girl whose name was, I think, Annie Tulley?

A. Yes, sir.

Q. What have you to say about that visit——

Mr. DARLINGTON: I object to that. The witness was interrogated about that and denied ever having seen the girl.

Mr. WORTHINGTON: She was asked about the girl having been there, but she was not confronted with the girl.

Mr. DARLINGTON: Her name was given.

243 Mr. WORTHINGTON: Her name was given, but the individual was not here at that time and she could not see her. I think I have the right, now that she has been here on the stand, to ask her whether that girl ever came to that house.

The COURT: I think you have the right to ask the question since the girl has been produced. If she had been in court at the time the question was put and had seen the person that would have answered it. She has said that she did not see Miss Throckmorton there with any other person.

Mr. DARLINGTON: We thought that the rule would allow the introduction of testimony to rebut particular incidents. For example, after proving the signature of Gen. Sherman they introduced testimony tending to prove particular points of difference in that signature. We thought we had the right to introduce rebuttal proof on that point, but it was ruled that we had not.

The COURT: That was a very different matter. It is very well known that you cannot introduce collateral writings for the purpose of showing the peculiarities in handwriting.

Mr. DARLINGTON: I am referring now to the testimony of Mr. Sherman, that the peculiarity indicated in the testimony of their witnesses was not a peculiarity in his father's signature, and that his father did sign his signature where the two lines of the quirl did not coincide. It seems to me that is a much stronger case of rebuttal testimony than this could be; but, however, we content ourselves with reserving an exception if your honor thinks that is proper.

The COURT: The girl was called for two purposes: First, to
244 corroborate Miss Throckmorton by saying that she was at the house on a certain occasion with her, and also for the purpose of indicating that she had been there. This witness had already testified that she was there on one occasion. This is simply for the purpose of contradicting her, and I think the question may be put whether, having seen the witness upon the stand, this witness can now state whether she ever saw her at that house.

Mr. DARLINGTON: We will reserve an exception.

By Mr. WORTHINGTON:

Q. You saw the girl, Annie Tulley, upon the stand?

A. Yes, sir.

Q. When did you see her before she was on the stand?

A. That is the first time I ever seen her.

Q. Can you tell us whether or not she came to the house at any time, when you met her there?

Mr. DARLINGTON: I object.

A. No, sir; I never seen her.

Mr. DARLINGTON: I take an exception.

24" *Exc.*

To the admission of which evidence the caveatees, by their counsel, objected; but the court overruled the said objection and admitted the said testimony; to which ruling and admission the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Said caveators further gave testimony tending to show that the hall in testator's house, in which the witness Annie Tulley said she sat while waiting for Miss Throckmorton, was six feet by eight feet, and that no chair was kept there; that a chair could be put there, but it would be uncomfortable to sit in the hall in a dark place; that the only furniture in the hall was a hall-rack for people to hang their hats on.

244½ The caveators further introduced as a witness on their behalf JAMES E. BELL, superintendent of the city post-office delivery of Washington, D. C., who gave testimony tending to show that the envelope in which the will was forwarded to the register of wills, and which envelope was stamped by the Post-office Department "Washington, D. C., May 24, 6 p. m., 1895," "L," was a local letter, the said "L" being what is called by the post-office the "Local" stamp; that had the said envelope been delivered to the city post-office it would have been stamped with a number indicating the man who stamped it, but that all local matter brought in from the letter-boxes by the collectors bears the imprint "L," which appears on the envelope; that said envelope was collected from the northwest section of the city, which section is bounded on the east

by North Capitol street, on the south by the Mall, on the west by Georgetown, and that the envelope in question was deposited somewhere in said section between the hours of three and four p. m.; possibly a little earlier or little later.

245 Thereupon, the foregoing being all the testimony in the cause, the caveators prayed the court to instruct the jury as follows:

4. As to the question of revocation the jury have the right to consider such burning and mutilation of the paper-writing in controversy as they may be satisfied from the evidence existed when it reached the office of the register of wills, together with all the evidence in the case tending to show any change occurring after February 7th, 1873, in the relations of the testator either to the persons named as beneficiaries in the alleged will or any of them or to those who would be entitled to his estate under the law if he had died intestate, and if the jury are satisfied from all this evidence taken together that such burning and mutilation was done by Joseph Holt or by his directions with the intention of revoking the same, then the jury are instructed that they should answer the fourth issue, "Yes."

25" *Exc.*

To which prayer for instructions the caveatees, by their counsel, then and there objected; but the court overruled their said objection and granted the said instruction to the jury; to the overruling of which objection and to the granting of said prayer for instruction the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the caveators prayed the court to further instruct the jury as follows:

7. If the jury find that said paper-writing was both signed and sealed by said Joseph Holt, and that he afterwards removed
246 or caused to be removed such seal with the intention of revoking said will, then the jury are instructed to answer the fourth issue in the affirmative.

26" *Exc.*

To which prayer for instructions the caveatees, by their counsel, then and there objected; but the court overruled their said objection and granted the said instruction to the jury; to the overruling of which objection and to the granting of said prayer for instruction the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the caveators prayed the court to further instruct the jury as follows:

8. The jury are instructed to disregard any opinion as to whether Joseph Holt wrote the paper in controversy that may have been expressed by any of the witnesses for the caveators in this case so

far as such opinion was based upon anything but the handwriting of the paper. In so far as any such opinion may have been based, in whole or in part, upon the composition of the paper or the expressions contained in it or the legal or literary attainments of said Joseph Holt they are withdrawn from the consideration of the jury, but all other evidence which has been admitted in this case bearing upon the legal attainments and literary style of said Joseph Holt remains as competent evidence for the consideration of the jury, along with the other evidence in the case bearing upon the question of the genuineness of said paper.

27" *Exc.*

To which prayer for instructions the caveatees, by their counsel, then and there objected; but the court overruled their said objection and granted the said instruction to the jury; to the over-
247 ruling of which objection and to the granting of said prayer for instruction the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the caveators prayed the court to further instruct the jury as follows:

10. The jury are instructed that the question for their determination as to the first issue in this case is whether they are satisfied by a fair preponderance of the evidence that Joseph Holt executed the paper in controversy, and not whether, if he did not execute it, by whom it was written; and if the jury are not so satisfied as to the fact of the execution of said paper by said Joseph Holt they should not be deterred from rendering a verdict accordingly by any effect such verdict may be supposed to have upon any other person. The question whether any person is criminally liable in connection with the preparation or mailing of said paper is not involved in this proceeding.

28" *Exc.*

To which prayer for instructions the caveatees, by their counsel, then and there objected; but the court overruled their said objection and granted the said instruction to the jury; to the overruling of which objection and to the granting of said prayer for instruction the caveatees then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

248 Thereupon the caveatees prayed the court to instruct the jury as follows:

1. The jury are instructed that their answer to the second issue should be no.

29" exc.

2. The jury are instructed that their answer to the third issue should be no.

Which instructions the court granted.

30" exc.

Thereupon the caveatees prayed the court to further instruct the jury as follows:

3. The evidence in this case is insufficient to justify a finding that the paper-writing dated the seventh day of February, A. D. 1873, if the jury shall find that the same was executed by Joseph Holt as his last will and testament, has been revoked by him, and the jury are instructed that their answer to the fourth issue should be no.

31*st Exc.*

But the court refused so to instruct the jury; to which refusal to grant the said instruction the caveatees, by their counsel, then and there duly excepted; which exception was noted at the time upon the minutes of the court.

249 Thereupon the caveatees prayed the court to further instruct the jury as follows:

5. The jury are instructed that there is no sufficient evidence in this case to justify them in finding that the burning, tearing, cutting, or other mutilation of the paper-writing dated February 7th, 1873, was done by Joseph Holt or by his direction.

32*" Exc.*

But the court refused so to instruct the jury; to which refusal to grant the said instruction the caveatees, by their counsel, duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the caveatees prayed the court to further instruct the jury as follows:

6. The jury are instructed that there is no sufficient evidence in this case to justify them in finding that the burning, tearing, cutting, or other mutilation of the paper-writing dated February 7th, 1873, was done by Joseph Holt or by his direction with intent to revoke said instrument.

33*" Exc.*

But the court refused so to instruct the jury; to which refusal to grant the said instruction the caveatees, by their counsel, then and there duly excepted; which exception was noted at the time upon the minutes of the court.

Thereupon the caveatees prayed the court to further instruct the jury as follows:

12. The jury are instructed that they cannot consider alleged oral declarations of Joseph Holt to the effect that he had made a will creating Washington Holt his executor, or alleged declarations to the effect that Joseph Holt had made a will in Washington Holt's favor as showing or tending to show revocation of any will

250 which the jury may conclude from the testimony was duly executed by the said Joseph Holt prior to such declarations.

34″ *Exc.*

But the court refused so to instruct the jury; to which refusal to grant the said instruction the caveatees, by their counsel, then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the caveatees prayed the court to further instruct the jury as follows:

13. The jury are instructed that they cannot consider any letters or writings offered in evidence, not themselves testamentary in character or not being in effect a last will and testament, for the purpose of showing or tending to show revocation of any will which the jury may conclude was duly executed by the said Joseph Holt prior to the date of such letters and writing.

35″ *Exc.*

But the court refused so to instruct the jury; to which refusal to grant the said instruction the caveatees, by their counsel, then and there duly excepted, and the said exception was noted at the time upon the minutes of the court.

Thereupon the court further instructed the jury, at the instance of the caveators and without objection on the part of the caveatees, as follows:

3. The jury are instructed that as to the first issue in this case the burden of proof is upon the proponents of the alleged will, and unless the jury are satisfied by a fair preponderance of the evidence that the paper-writing in dispute, dated February 7th, 1873,
251 and purporting to be the last will and testament of Joseph Holt, was executed by said Joseph Holt as and for his last will and testament, they will answer the first issue in the negative.

9. The jury are instructed that no statement which may have been made by George Johnson to the witness Truesdell as to declarations made by Joseph Holt to said Johnson can be considered by the jury for any purpose except that of affecting the credibility of said Johnson.

Thereupon the court further instructed the jury, at the instance of the caveatees, as follows:

4. The jury are instructed that they are not at liberty to find that the paper-writing dated the seventh day of February, 1873, if executed by Joseph Holt as his last will and testament was revoked by him merely from the evidence which said paper-writing exhibits of having been burned, torn, cut, or otherwise mutilated. Before they can find such revocation from the fact of such burning, tearing, cutting, or mutilation they must find from the evidence, first, that such burning, tearing, cutting, or mutilation was done by the said Joseph Holt himself or by his direction; and, secondly, that such burning, tearing, cutting, or mutilation was done by him or in his presence and by his direction or consent for the purpose or

with the intent upon his part to revoke the said instrument; and the burden of proof upon each of these propositions is upon the caveators, who must satisfy the jury by a fair preponderance of proof both that such burning, tearing, cutting, or mutilation was done by Joseph Holt or by his direction, and that the same was done with the purpose and intent of revoking said instrument.

252 7. If the caveators have failed to satisfy the jury by a fair preponderance of proof that the burning, tearing, cutting, or other mutilation of the paper-writing dated February 7th, 1873, was done by Joseph Holt or in his presence and by his direction and with the intent to revoke said instrument, then the burden of proof is upon them in this case, under the fourth issue, to satisfy the jury by a fair preponderance of proof that Joseph Holt revoked said instrument by a later will.

And to entitle themselves in this case to a finding that said paper-writing was wholly revoked by a later will, they must satisfy the jury by clear and satisfactory proof that Joseph Holt did execute a later will; that said later will was inconsistent with the paper-writing of February 7th, 1873, and that such later will was either in existence at the time of the death of Joseph Holt or was destroyed accidentally or fraudulently in his lifetime.

8. If the jury shall believe from the evidence that there was such a later will of Judge Holt, duly executed, and that it was either in existence at the time of his death or was destroyed accidentally or fraudulently in his lifetime, still, unless such later will contained an express revoking clause, of which there is no evidence in this case, it will not justify a finding that the paper-writing of February 7th, 1873, was thereby revoked, except to the extent that the contents of such later will, if there was one, are clearly proved and are shown to be inconsistent with the earlier instrument. Thus if they should believe from the evidence that there was such a later existing but lost will, and that it differed from the paper-writing

253 of February 7th, 1873, in the disposition of the testator's property, but in what particulars or to what extent it so differed they should be unable from the evidence to determine, this will be insufficient to justify a finding that the said paper-writing of February 7th, 1873, has been revoked.

9. If, however, the jury should believe from the evidence that there was such a later existing but lost will or will accidentally or fraudulently destroyed in the lifetime of the testator, and that any of its provisions have been clearly proven, which provisions are inconsistent with those of the paper-writing of February 7th, 1873, in part only, as by the gift of any specific property to a person not named in said earlier paper-writing or by the appointment of a different executor, this would be a revocation *pro tanto*, as it is called—that is, a revocation to the extent of such clearly proven and inconsistent provisions only, and their answer to the fourth issue should be so framed accordingly.

10. If the jury shall believe from the evidence that Joseph Holt did execute the paper-writing dated February 7th, 1873, as his last

will and testament, and that he afterwards executed a later will, inconsistent with it, which could not be found at the time of his death, the legal presumption is that he himself destroyed such later will, and that he thereby revived the earlier one, unless there was in such later will a clause of express revocation, of which there is no evidence in this case, or unless the jury shall believe from the evidence that the burning, tearing, cutting, or other mutilation of the earlier will was done by the testator in his presence or by his direction and with the intent and purpose to revoke it. This presumption
254 that the testator himself destroyed such later will, if there was one, is not conclusive, but it places the burden of proof upon the caveators to satisfy the jury by a fair preponderance of proof that such later will was in existence at the time of the testator's death or that it was in his lifetime destroyed by fraud or accident.

11. The jury are instructed that the testimony which has been admitted touching the business transactions and differences between Joseph Holt and the husband of Mrs. Ray is admitted for the purpose solely of tending to prove the intent or purpose with which the paper-writing of February 7th, 1873, was burned, torn, cut, or otherwise mutilated—*i. e.*, whether with the intent or purpose to revoke said paper-writing, in case the jury shall find from the evidence that such burning, tearing, cutting, and other mutilation was done by the testator or in his presence and by his direction. Unless the jury shall find from the evidence that the said burning, tearing, cutting, or other mutilation was in fact done by the said Joseph Holt or by his direction, the testimony in reference to the said Ray transactions and differences is not competent upon any question in this case and should be wholly disregarded.

And thereupon the court of its own motion further instructed the jury as follows:

255 WASHINGTON, D. C.,
THURSDAY, *June 25th*, 1896—3.15 o'clock p. m.

Charge to the Jury.

By Mr. Justice BRADLEY:

GENTLEMEN OF THE JURY: I have no doubt it is with a sigh of relief that you reach this stage of this case. You have been kept from your business and from your usual occupations not only during the month of your service which precedes the present month of June, but beyond the ordinary time which the law imposes upon a citizen as the length of service upon a jury in this District, from the first of June down to the present day.

I have no doubt the feeling of relief is not confined to yourselves, but that it is common to both counsel and litigants, and I can vouch for it as being surely enjoyed by the court.

It is a source of sincere congratulation, I think, that during this long trial no one of you has been sufficiently indisposed by sickness to keep him from the court-room, and that although indisposition has affected some of the counsel, and the court as well, that

indisposition has not been so extensive as to absolutely prevent the continuance of the trial, so that we have been subjected to no delays. The fact that the case has taken so long is not due to any matter over which we have had control, unless it be said that the court could have abbreviated the evidence, but is due to the
256 fact that a case of this nature is largely made up of circumstances which it seemed not only proper that the court should admit in evidence, but absolutely necessary and essential to the interests of justice. These circumstances have been so numerous that it has necessarily taken much time to lay them before you.

I do not apprehend that your attendance upon this trial, when it is over, will be regarded by you as an unmixed evil, although you may have been subjected to a great deal of inconvenience in your business, but that you will rather esteem it to be a privilege on your part to have sat as triers of the facts in a case that is so remarkable in all of its features as the case on trial and as well in a case that has been distinguished by such remarkable ability on the part of counsel who have represented both sides of this controversy.

I am sure that it has never before been your pleasure to sit and listen to a case that has been so admirably tried on both sides, and I do not remember a case that has been so striking in that feature in my own brief experience on the bench.

There has not been very much for the court to do, for counsel have been so amiable and accommodating to each other that many features of this case are features which the law books would not recognize. Evidence has been admitted by consent of counsel which the court would have been obliged to exclude if objection had been made, so that the duty of the court has not only been light, because of the few questions of law that have been raised, but it has been rendered pleasant and its onerousness has been alleviated very largely by the amiability of counsel, for in the
257 course of this whole trial there has not been an unpleasant incident, and although the trial has necessarily aroused all the earnestness of which counsel have been capable on no occasion has that earnestness passed to the degree of offensiveness or disagreeable remark or manner.

This, owing to the fact that lawyers are blessed (or cursed) with the same human nature that ordinary mortals are, is a rather unusual circumstance.

So that I think it is an occasion for sincere congratulation to counsel on both sides that we have passed through these many days of trial with unruffled equanimity; that the case has been tried with such distinguished ability, and that their clients, I am sure, no matter what the outcome may be, cannot say that it was due to the lack of interest, earnestness, or ability of their counsel.

You have been so well advised during the progress of this case as to the character of the evidence, the office which is sought to be accomplished by it, the particular relation that each item of evidence has borne to the questions that you are to try, and as well thoroughly advised by the arguments of counsel as to the bearing of the facts upon the issues and the law itself applicable to the case

embraces so few principles, that it is absolutely unnecessary for the court to do more than advert to the issues themselves and to the principles that affect them and to make a few comments upon the prayers that have been offered and granted by the court to
258 both sides, so that, at the outset, I will advise you that you need not expect that the court will occupy many minutes before the case is finally committed to your hands and the issues are entirely left with you.

There are four issues that have been sent up by the orphans' court to this court for trial, and to each of these issues you must return an answer. That answer will be "Yes" or "No," save with respect to the fourth issue, as to which, upon some contingency of the evidence, to which the court will advert in reading an instruction granted to the caveatees, the answer may be, if the evidence justifies it, some other answer than a simple affirmative or negative.

The first issue is this:

"1. Was the paper-writing bearing date the 7th day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?"

That is to say, was the paper which is in controversy here, which you have all seen during the progress of the trial, executed by Joseph Holt, the testator, as his last will and testament?

"2. Was the execution of said paper-writing procured by fraud exercised and practiced upon said Joseph Holt by any person or persons?

"3. Was the execution of said paper-writing procured by the undue influence of any person or persons?

"4. If the said paper-writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by the testator?"

Your deliberations upon these issues will be confined absolutely to the first and fourth, for those are the only issues that have been on trial. The second and third issues relate to the questions
259 of fraud and undue influence exercised and practiced upon the testator by any person or persons, and the second and third issues you will necessarily answer "No," for there is no evidence which would justify any other conclusion. The court directs you that you return that answer to these two issues.

The first issue is this question. Was this paper-writing of February 7th, 1873, which has been exhibited to you and which is the subject of controversy here, executed by Judge Holt, the testator? This, you see, raises simply the question of execution. Inasmuch, however, as the testimony has indicated and the instrument itself indicates that this entire will, as well as the signature, purports to be in the handwriting of Joseph Holt, the question necessarily is: Was this will, as well as the signature to it, written by him? And, as a necessary sequence, if it was not written by him, either as to the signature or body, it is not his will. If it was written by him and signed by him as his last will and testament,

then it matters not what its contents are, who is benefited by it, or who is deprived of benefit by it. The fact being established that this will is in his handwriting and signed by him, your answer to this first issue would necessarily be "Yes," no matter how you think the will ought to have been drawn, what should have influenced Joseph Holt in drawing his will, or whether or not, in so drawing it, he was properly influenced by considerations for those who would be the natural objects of his bounty.

The controversy hinges, therefore, upon this question as to this issue: Was this will written and signed by Joseph Holt?

260 If this will had been found (when I say "will" I do not mean to indicate that it is a will, for that is a question you are to determine) among the papers of Joseph Holt, that circumstance would lend to the instrument a presumption of genuineness. If it had been enlightened by the testimony of any one of these subscribing witnesses, probably this question would not have been put before you for determination. If any one of these subscribing witnesses—Gen. Grant, who was at the time of this alleged execution and of his alleged attestation President of the United States, or Gen. Sherman, who, I believe, was General of the Army at that time, or his wife—had appeared here, I hardly think you would have any question as to the genuineness of the signature of Joseph Holt. The mere statement under oath of any of these distinguished, reputable people that he or she had seen Joseph Holt sign his name to this paper, or that he or she had had the acknowledgment made to him or her by Joseph Holt that he had signed the paper, would be sufficient to convince your judgment that Joseph Holt had executed it, and it would have been a waste of time and of money probably for the caveators to contend before you that this was not Joseph Holt's handwriting. If any other reputable person had been brought into this court who had been able to testify that he had, although not an attesting witness, seen Joseph Holt sign this paper, or that Joseph Holt had acknowledged his signature to him, the question would have been almost absolutely foreclosed.

The difficulty, however, is this, that these attesting witnesses, whom the caveatees, the propounders of this will, would neces-

261 sarily be obliged to call if alive or if accessible and within the jurisdiction of the court, are all dead, and we are absolutely deprived of all the light which an attesting witness can ordinarily throw about the execution of an instrument which he has attested. The purpose of the law in providing that a will of real estate shall be attested by three or four subscribing witnesses is that, in the matter of the transfer of real estate by will, it shall not be left absolutely and entirely to the signature of the testator, but the testator must attest his signature. He must acknowledge it in the presence of three or four subscribing witnesses in order to obtain the safeguard which their presence and knowledge would throw around the execution, and that those witnesses may come into court and establish the factum of the will.

If we were enlightened in this case as to the source from which this paper emanated just before it reached the office of the register

of wills, doubtless it would throw a great deal of light upon this question. Given the name of the person who deposited that envelope in the letter-box in this city, addressed to the register of wills, the source from which this paper emanated being known, probably the question as to whether this paper was ever among the papers of Joseph Holt or whether it emanated from him would be solved.

The difficulty is that this paper was deposited in the mail by some person who, for some fraudulent purpose of his own, deems it necessary to be quiet, or who is so recreant to duty that he
262 does not come forward and indicate the fact that it was so deposited. Who that person is there is no direct evidence in this case. Who that person may be, it is claimed by counsel for both parties, is indicated by the circumstances of this case. Who that person is you may be able to determine with some degree of probability by the circumstances and evidence that have been laid before you. Measure these circumstances by your experience as men—understanding men—and the motives that ordinarily influence them, and if you do reach a conclusion as to who, in all probability, sent this paper to the office of the register of wills you will, perhaps, have in your hands the key to the entire situation.

Now, the court has granted upon this issue the following instructions at the instance of the caveators—the caveators, you will understand, are the Holt heirs, the next of kin, the blood relations of Joseph Holt, and the caveatees the parties who claim under the will:

"3. The jury are instructed that as to the first issue in this case the burden of proof is upon the proponents of the alleged will"—

That is, the caveatees—

"and unless the jury are satisfied by a fair preponderance of the evidence that the paper-writing in dispute, dated February 7th, 1873, and purporting to be the last will and testament of Joseph Holt, was executed by said Joseph Holt as and for his last will and testament, they will answer the first issue in the negative."

That instruction is not objected to. It is conceded by counsel for the caveatees, the proponents of the will, that that states the law.

That is to say, gentlemen of the jury, it is incumbent upon the parties who produce this will and claim it is genuine to satisfy your minds that it was written and signed by Joseph Holt.

263 Ordinarily, as I have indicated, this would be done by the production of the attesting or subscribing witnesses. Those witnesses being dead, the law permits testimony to be given as to the handwriting of the subscribing witnesses, and where there is an attesting clause to the will and evidence of handwriting, taken in connection with the attesting clause and its statements (such statements being ordinarily these: "Signed, sealed, published, and declared as and for the last will and testament of Joseph Holt in our presence, who, in his presence and in the presence of each other and at his request, have signed our names as witnesses"), the law as-

sumes that the will was duly executed; otherwise these people would not have signed such an attesting clause.

In this case there is no attesting clause, and the counsel for the caveatees, the proponents of the will, offered evidence not only as to the signatures of the witnesses, but also evidence tending to show that the signature of Joseph Holt or J. Holt was genuine, and upon such evidence having been offered and given the court permitted the will to be received and read in evidence. Such evidence made a *prima facie* case of due execution of the will. If no other evidence had been given in the case on the part of the caveators, evidence given to that extent only would have justified and, under the law, compelled the jury to reach the conclusion that this will was duly executed by Joseph Holt, but that was not all. Counsel for the caveatees offered a good deal of additional testimony as to the genuineness of the signature of Joseph Holt. On the other hand,
264 a great deal of evidence has been offered on both sides, opinion evidence of those who claim to have had a knowledge of Joseph Holt's signature, as well as evidence of persons who claim to be experts, as to the genuineness of the handwriting, as to the character of the paper, as to the severance of portions of the paper, as to inks, and so forth; and it is for you to say whether, under this condition of affairs, the *prima facie* case that is made by proof of the handwriting of the attesting witnesses and the opinion of witnesses as to Joseph Holt's signature has been overcome by all the evidence in the case, and whether, upon the whole evidence, you are satisfied that this will was written and signed by the testator, Joseph Holt.

You will readily see that the burden being imposed upon the caveatees to convince your judgment that this will is genuine, and they having assumed to satisfy your judgment, that the evidence given in support of the genuineness of this will and of its due execution must preponderate in favor of the caveatees, must turn the scale in the direction of their contention; otherwise your verdict must be that this is not the will of Joseph Holt—that is to say, you must be satisfied and convinced by the evidence that Joseph Holt executed this paper; otherwise your answer to this first issue must be "No."

The court has granted, at the instance of the caveators, the prayer numbered 8, which I will read to you in this connection:

"8. The jury are instructed to disregard any opinion as to whether Joseph Holt wrote the paper in controversy that may have
265 been expressed by any of the witnesses for the caveators in this case so far as such opinion was based upon anything but the handwriting of the paper. In so far as any such opinion may have been based in whole or in part upon the composition of the paper"—

That means the literary composition, not the mechanical composition—

"or the expressions contained in it, or the legal or literary attainments of said Joseph Holt, they are withdrawn from the consideration of the jury."

That you will understand, gentlemen, to mean that where any witness whom you recall has testified as to the non-genuineness of this paper, who has based his opinion, either wholly or in part, upon the character of the composition or upon any other circumstance than the handwriting alone, you must disregard that opinion, because it is withdrawn from your consideration.

"But all other evidence which has been admitted in this case bearing upon the legal attainments and literary style of said Joseph Holt remains as competent evidence for the consideration of the jury, along with the other evidence in the case bearing upon the question of the genuineness of said paper."

That is to say, from the photograph that you have had of the character and attainments of Judge Holt by the evidence in this case, either by his own letters or by the oral evidence of witnesses, you may judge whether it is likely or not that Joseph Holt would have composed and written the paper in controversy. That evidence is submitted to you for such weight as you may see fit to give it, as is all this opinion evidence of experts and non-experts, as is also the intrinsic evidence of the paper itself, if there is any intrinsic evidence in the paper itself which in your judgment affects the question whether this paper is genuine or not. You are also
266 to consider the circumstance touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this will, up to the time of the date of this will, bearing directly upon this question whether it would be likely that he would have made such a will at that time, and also the subsequent conduct of the testator towards his next of kin or heirs-at-law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood, of his having made such disposition of his estate as is made by this paper in controversy.

If, upon the consideration of all of this evidence, you reach the conclusion that this paper is not established to your satisfaction as the genuine paper of Joseph Holt, your answer to this first issue should be "No." If the evidence positively satisfies you that he did not execute it, your answer should also be "No;" for the question is, Was it executed by him?

If your answer to this first question or issue is "No," that is the disposition of this case, and it would become unnecessary for you to consider any further evidence bearing upon the other issue, for if he did not execute the paper it is perfectly plain that he could not have revoked it, and that is the only remaining and other question in the case. If you conclude that he did not execute the paper, you may conclude, without reference to any further evidence in the case, that he did not revoke it, and your answer to both issues should be "No."

If your answer to this issue, however, should be "Yes;"
267 if you reach the conclusion and your judgment is satisfied that it is the genuine instrument of Joseph Holt, then it becomes necessary for you to inquire what answer you must give to the fourth issue.

The fourth issue, in brief, is simply the inquiry, Has this will been revoked by Joseph Holt?

That inquiry has been divided into two questions. The first is, Has it been revoked by tearing or cutting or burning by the testator with intent to revoke the will, or by any one in his presence and by his direction?

The second inquiry is, If not revoked by such act, has it been revoked by a later will, executed as the law requires such a will should be executed?

Upon the first branch of this question I will read the fourth prayer of the caveatees and the fourth prayer of the caveators.

First, the fourth prayer of the caveatees:

"4. The jury are instructed that they are not at liberty to find that the paper-writing dated the seventh day of February, 1873, if executed by Joseph Holt as his last will and testament, was revoked by him merely from the evidence which said paper-writing exhibits of having been burned, torn, cut, or otherwise mutilated. Before they can find such revocation from the fact of such burning, tearing, cutting, or mutilation they must find from the evidence, first, that such burning, tearing, cutting, or mutilation was done by the said Joseph Holt himself or by his direction, and, secondly, that such burning, tearing, cutting, or mutilation was done by him or in his presence and by his direction or consent for the purpose or with the intent upon his part to revoke the said instrument; and the burden of proof upon each of these propositions is upon the caveators, who must satisfy the jury by a fair preponderance of proof both that such burning, tearing, cutting, or mutilation was done by Joseph Holt or by his direction, and that the same was done with the purpose and intent of revoking said instrument."

No. 4 of the caveators is as follows:

268 "4. As to the question of revocation, the jury have the right to consider such burning and mutilation of the paper-writing in controversy as they may be satisfied from the evidence existed when it reached the office of the register of wills, together with all the evidence in the case tending to show any change occurring after February 7th, 1873, in the relations of the testator either to the persons named as beneficiaries in the alleged will or any of them or to those who would be entitled to his estate under the law if he had died intestate, and if the jury are satisfied from all this evidence taken together that such burning and mutilation was done by Joseph Holt or by his directions, with the intention of revoking the same, then the jury are instructed that they should answer the fourth issue 'Yes.'"

You will perceive, gentlemen of the jury, that you must find from the evidence not only that the tearing, burning, or mutilation of this paper was the act of Joseph Holt or of some one else in his presence and by his direction, but that it was his act with the intention to revoke the instrument.

There is no direct evidence in the case that relates to this particular instrument. No one has been examined who has testified that he or she ever saw this paper before it appeared in the office of the

register of wills. So that your inquiry as to this question must be addressed to the circumstances in evidence. If those circumstances satisfy you that this paper, if genuine, was mutilated, torn, or burned by Joseph Holt, and that it was his act with the intention to revoke it, then your answer to this inquiry should be "Yes."

There is no question but that the instrument is burned. There is no question but that it was torn, and to some extent mutilated, when it reached the office of the register of wills; and upon this inquiry you must take the paper as it was when it reached the office of the register of wills. You can judge of that by the testimony which you have heard.

Upon the question of burning, the slightest burning,
269 coupled with the intent to revoke, is a sufficient act on the part of the testator to accomplish the fact of revocation.

So the presumption would be that, this instrument purporting to be sealed by the testator (although no seal appears upon it), the instrument was sealed. There is no seal upon it. It appears that the portion where the seal might have been, and probably was, has been removed.

While it was not necessary to a testamentary paper of this character that it should bear the seal of the testator, yet if he executed it as a sealed instrument that seal becomes an important feature of the paper itself. If you believe from the evidence that he subsequently tore off that seal with intent to revoke the will, that act would be sufficient to accomplish the act of revocation.

If this paper had been found among the papers of Joseph Holt, and it had come from among his papers in the condition in which you see it today, there would be a clear presumption of law, which would have to be overcome by those who claim under the will, that the act of burning or tearing was done by the testator, and that it was done with the purpose of revoking the will.

But, unfortunately for that theory of the case, this will does not come from among the papers of Joseph Holt, so far as the evidence indicates. Where it comes from you will have to surmise from the evidence and from the inferences to be drawn from that evidence. There is, therefore, no presumption arising out of the fact itself that the paper has been mutilated, burned, or torn that it was
270 the act of Joseph Holt; but you are to take these circumstances in connection with all the evidence and strive to reach a conclusion.

The burden of proof is upon the caveators, who assail this instrument, to satisfy you, if you believe it was genuine, that it has been revoked, and that burden must be borne by them to this extent: that by the preponderance of the evidence they overweigh the other theory and satisfy your minds that the instrument has been so revoked.

If you reach the conclusion that the will was revoked by this act you need not inquire into the other branch of the question, whether the paper was revoked by a subsequent will; but if you are not satisfied by the evidence upon this point that it was revoked by mutilation or burning by the act of the testator with intent to

revoke it, then you will have to go further and inquire whether it has been revoked by a subsequent will.

Upon that point I will simply refer to prayers numbered 7 to 11 of the caveatees, and read them to you:

"7. If the caveators have failed to satisfy the jury, by a fair preponderance of proof, that the burning, tearing, cutting, or other mutilation of the paper-writing dated February 7th, 1873, was done by Joseph Holt or in his presence and by his direction and with the intent to revoke said instrument, then the burden of proof is upon them in this case, under the fourth issue, to satisfy the jury by a fair preponderance of proof that Joseph Holt revoked said instrument by a later will.

"And to entitle themselves in this case to a finding that said paper-writing was wholly revoked by a later will they must satisfy the jury by clear and satisfactory proof that Joseph Holt did execute a later will; that said later will was inconsistent with the paper-writing of February 7th, 1873, and that such later will was either in existence at the time of the death of Joseph Holt or was destroyed accidentally or fraudulently in his lifetime."

"8. If the jury shall believe from the evidence that there was such a later will of Judge Holt, duly executed, and that
271 it was either in existence at the time of his death or was destroyed accidentally or fraudulently in his lifetime, still, unless such later will contained an express revoking clause, of which there is no evidence in this case, it will not justify a finding that the paper-writing of February 7th, 1873, was thereby revoked, except to the extent that the contents of such later will, if there was one, are clearly proved and are shown to be inconsistent with the earlier instrument. Thus, if they should believe from the evidence that there was such a later existing but lost will, and that it differed from the paper-writing of February 7th, 1873, in the disposition of the testator's property, but in what particulars or to what extent it so differed they should be unable from the evidence to determine, this will be insufficient to justify a finding that the said paper-writing of February 7th, 1873, has been revoked."

The evidence, gentlemen of the jury, must be specific to such extent as to indicate inconsistency between the paper in controversy and the alleged later will in the disposition of the entire estate or with reference to some particular portion of the estate.

"9. If, however, the jury should believe from the evidence that there was such a later existing but lost will or will accidentally or fraudulently destroyed in the lifetime of the testator, and that any of its provisions have been clearly proven, which provisions are inconsistent with those of the paper-writing of February 7th, 1873, in part only, as by the gift of any specific property to a person not named in said earlier paper-writing or by the appointment of a different executor, this would be a revocation *pro tanto*, as it is called—that is, a revocation to the extent of such clearly proven and inconsistent provisions only—and their answer to the fourth issue should be so framed accordingly."

That is to say, if you find that the will was not revoked entirely

by making an inconsistent and entirely different provision as to the entire estate, but you do find that there were some inconsistent provisions or dispositions of some part of the estate, or that a different executor was appointed, then this paper in controversy would be revoked to that extent and that extent only.

272 If, however, you find from the evidence that there was such a later will, and that it made a different disposition of the entire estate of the testator, and you believe from the evidence that that will was executed in due form and was attested by the testator in the presence of three or four witnesses, it would be an entire revocation of the paper in controversy.

"10. If the jury shall believe from the evidence that Joseph Holt did execute the paper-writing dated February 7th, 1873, as his last will and testament, and that he afterwards executed a later will, inconsistent with it, which could not be found at the time of his death, the legal presumption is that he himself destroyed such later will, and that he thereby revived the earlier one, unless there was in such later will a clause of express revocation, of which there is no evidence in this case, or unless the jury shall believe from the evidence that the burning, tearing, cutting, or other mutilation of the earlier will was done by the testator, in his presence or by his direction, and with the intent and purpose to revoke it. This presumption that the testator himself destroyed such later will, if there was one, is not conclusive; but it places the burden of proof upon the caveators to satisfy the jury by a fair preponderance of proof that such later will was in existence at the time of the testator's death, or that it was in his lifetime destroyed by fraud or accident."

This presumption is a presumption of law, and, as the instruction indicates, it is not conclusive; it is a legal presumption, I mean. It is not conclusive; it may be overcome by the evidence. The same evidence that satisfies you that such a will did exist may possibly satisfy you that the will was not destroyed by the testator during his lifetime; and in this connection you should take into consideration all the declarations of the testator, especially those made in the latter part of his life, in his last days, that you find have any bearing upon this question to determine whether that presumption, if the will is destroyed, is overcome by this evidence.

273 Prayer numbered 11 granted on behalf of the caveatees is one that bears very remotely upon this question. I will read it, however, because it has been granted:

"11. The jury are instructed that the testimony which has been admitted touching the business transactions and differences between Joseph Holt and the husband of Mrs. Ray is admitted for the purpose solely of tending to prove the intent or purpose with which the paper-writing of February 7th, 1873, was burned, torn, cut, or otherwise mutilated—*i. e.*, whether with the intent or purpose to revoke said paper-writing—in case the jury shall find from the evidence that such burning, tearing, cutting, or other mutilation was done by the testator or in his presence and by his direction. Unless the jury shall find from the evidence that the said burning, tearing, cutting,

or other mutilation was in fact done by the said Joseph Holt or by his direction the testimony in reference to the said Ray transactions and differences is not competent upon any question in this case and should be wholly disregarded."

To that, I understand, there was no objection and no exception.

If you reach the conclusion that this will was genuine and is genuine, and that it has been revoked by obliteration, cancellation, burning, tearing, or act of the testator with intent to revoke, your answer to this fourth issue should be "Yes." If you reach the conclusion that it has been revoked by a later will containing inconsistent provisions and those inconsistent provisions do not go to the extent of the entire estate, then you should indicate by your answer to this issue to what extent the inconsistency goes and to what extent the will is thereby revoked, if you find it is revoked. If you find that the later will covers the entire estate, if there was such a thing as a later will, duly executed, then your answer to this fourth issue should be "Yes." If, however, you do not find that the will
274 was revoked by either of these means and you find that it was genuine, then your answer to this issue should be "No."

There are two additional instructions asked by the caveators, which I will read and then, with a very few words, submit this matter to you.

The first of these is numbered 9:

"9. The jury are instructed that no statement which may have been made by George Johnson to the witness Truesdell as to declarations made by Joseph Holt to said Johnson can be considered by the jury for any purpose except that of affecting the credibility of said Johnson."

The tenth and last instruction is as follows:

"10. The jury are instructed that the question for their determination as to the first issue in this case is whether they are satisfied by a fair preponderance of the evidence that Joseph Holt executed the paper in controversy and not whether, if he did not execute it, by whom it was written; and if the jury are not so satisfied as to the fact of the execution of said paper by said Joseph Holt, they should not be deterred from rendering a verdict accordingly by any effect such verdict may be supposed to have upon any other person. The question whether any person is criminally liable is not involved in this proceeding."

It is your province, gentlemen of the jury, to pass upon the evidence, and it is your duty to base your conclusions absolutely and solely upon the evidence. It is not your province to make a will for Joseph Holt, if in your judgment you should be satisfied that he ought to have made a different will from the will in controversy. It is not your province to unmake a will, unless the evidence is of such character as to satisfy you either that Judge Holt did not execute this paper, or, if he did execute it, that he subsequently revoked it.

In passing upon these questions you should be influenced by
274½ no other motive than the desire to reach the exact truth. Let justice be done, no matter who is injured by your verdict.

You are not responsible for the outcome of this case. It matters not to you, and it should not make any difference as to your conclusions upon the evidence in this case, whether the result will indicate prevarication or perjury on the part of any witness who has been examined in your hearing, whether that witness be high or low socially. It matters not to you, and you should not permit these considerations to influence your judgment to the slightest degree, what may be the subsequent outcome of this case, who will be injured by your verdict, either pecuniarily or who ultimately may be subjected to criminal prosecution. It is not your province to determine, if this will is not genuine, by whom it was forged. Your province is to determine, simply, is it the genuine instrument of Joseph Holt? If it is the genuine instrument of Joseph Holt, then, as I have indicated to you, it is not your business that the devise to these beneficiaries may cut out the next of kin and the blood relations of Joseph Holt.

With the consequences you have nothing to do. Do not permit considerations of expediency or of sympathy for any one to enter into your deliberations. Render your verdict in accordance with the conclusions to which the evidence compels you, and let the consequences of such verdict adjust themselves and rest where they may. Then will your consciences be clear before God and man, and the community should be satisfied with your verdict.

Take the case, gentlemen.

275 Mr. DARLINGTON: Before the jury retire, if the court please, there are some little things, most of which can be readily removed, to which I wish to call attention.

Your honor, after reading the instruction that the burden rested upon the caveatees to satisfy them by a fair preponderance of proof, afterwards used some such language as might be misunderstood as requiring us to satisfy them beyond a doubt. For example, you told them that their judgment must be satisfied and convinced. I only ask your honor to state to them that this does not mean beyond a reasonable doubt, but it does mean by a fair preponderance of the evidence.

The COURT: Gentlemen of the jury, I did not mean to convey any such idea. Those of you who have sat on juries in the criminal court, if any of you have, will be readily aware of the fact that in a criminal prosecution to justify a conviction the jury must be satisfied of guilt beyond a reasonable doubt. But in a civil case a less degree of proof is sufficient—that is, a fair preponderance of the evidence, which, as I have said, is evidence that is sufficient to outweigh the other side.

Mr. DARLINGTON: Then your honor said something about the absence of an attesting clause to this will. We desire to except to so much of the phraseology as indicated that the absence of an attesting clause detracts anything from the proof of the handwriting of the attesting witnesses.

The COURT: I did not mean anything of the kind. I do not see how any one could have so misunderstood me.

Mr. DARLINGTON: When the charge is written up we will
276 see just what you said. That is the way it struck me, and I wish to save the point.

The COURT: If there is any misunderstanding, I want to correct it now. I simply said to the jury, and I think they will recall the fact, that the reason proof of the genuineness of the handwriting of attesting witnesses who are dead or beyond the jurisdiction of the court is received to show the execution of the instrument is the presumption that they would not put their names to an attesting clause and certify to a fact that was not true; that there was no attesting clause in this will, but that, upon proof of the handwriting of these witnesses and proof also of the handwriting of Joseph Holt, the will was admitted in evidence; that upon such proof the caveatees had made out a *prima facie* case, and that proof in the absence of any countervailing proof would be sufficient not only to justify, as I said, but to compel the jury to reach the conclusion that it was a genuine instrument, but that they must consider all the evidence in the case that bears upon that question.

Mr. DARLINGTON: That is satisfactory, and I make no exception to that part of it.

Now, there were three other propositions laid down by the court which I think are covered by the prayers, but to which I wish to except, because in a recent case I was told by the Court of Appeals that because I had not excepted in the charge I waived my earlier exceptions.

Your honor told the jury, as I recorded you: "You may judge from the photograph of the testator's style and literary attainments whether he would have written such a paper as is here."

277 Also that "the subsequent conduct of the testator to his heirs and next of kin might be considered upon the question of whether or not he executed this will originally."

And, in the third place, that "his subsequent conduct towards the beneficiaries under the will might be considered in determining whether he executed the paper originally."

To each of those three propositions I except.

The COURT: Yes; having relation back to that. The first one is not correctly stated.

Mr. DARLINGTON: It may not be.

Mr. WORTHINGTON: Considered with the other circumstances in the case.

The COURT: Undoubtedly. I said that in commenting upon the instruction that had been asked and granted in behalf of the caveators. I said that it was only a circumstance in evidence that the attainments and character of Joseph Holt had been photographed, to a large extent, by his letters that had been read in evidence, and the jury could judge what sort of a man he was, and that by the testimony in that same behalf they could say whether upon that evidence, giving it such weight as they saw fit to give it, together with all the other evidence in the case, it was likely he would have executed this will.

Mr. DARLINGTON: I so understood it, and I desire to reserve an exception.

The next note I have is in reference to one of my own prayers upon the question of revocation. The prayer as you read it states
278 that if the jury find that it was burned or torn by the testator himself or by his direction and *in his presence* that they might consider that revocation.

I do not remember putting the words "*in his presence*" in the prayer, and I did not mean to put them there. I do not know that the law goes quite so far as that.

The COURT: It does. I put that phrase in there because I regarded it as essential under the statute. The instruction was excepted to, and if that were omitted I thought it would be fatal to the instruction.

Mr. DARLINGTON: Your honor told the jury that any burning would be sufficient to revoke. Of course, I know you mean any burning by the testator himself.

The COURT: I did say that.

Mr. DARLINGTON: You did at one place; yes.

Now, here is a point in favor of my friends that I want to make: Your honor told the jury that if they believed there was another will executed, and that it was attested by three or four witnesses, it would be an entire revocation. The law would not require any witnesses, of course, so far as we are concerned here under the Porter decision, as this is only a question of personalty, and whether there were witnesses or not would not, perhaps, be a matter of any consequence.

The COURT: The only provision of the law that relates to revocation of a will by cancellation, or burning, or obliteration, or tearing is the provision that relates to a will of real estate, and the manner in which that will may be revoked by such act is clearly pointed out.

Mr. DARLINGTON: We agree about that, but the point I
279 make is this: Suppose there was a will made giving all his property to A or B, and there were no witnesses to it at all, so far as the personalty is concerned I think I am prepared to concede it would be revocation.

The COURT: So far as the personalty is concerned. But how about the realty?

Mr. DARLINGTON: That is not involved here at all, under the Porter decision, no matter how this case should be decided.

The COURT: I do not know.

Mr. DARLINGTON: That is what the Supreme Court said in the Porter case.

The COURT: I do not think the Supreme Court intended to go to that extent. There was no issue there tried before a jury and sent up from the orphans' court; it was the act of the orphans' court alone in disposing of a will that purported to pass realty. The courts of Maryland are full of cases going back to the earliest days of wills that purport to pass realty, and I do not think it has ever been questioned that where there has been a trial of issues of

this character between the parties that the parties to the issue were absolutely concluded in any subsequent controversy, either at law or in equity.

Mr. DARLINGTON: I think myself there is that distinction; but in order to avoid going to the Supreme Court I am willing——

Mr. WORTHINGTON: He is willing to yield a point.

The COURT: I have no objection.

280 Mr. WORTHINGTON: Then will your honor state to the jury that a revoking will need not have any witnesses in this case?

The COURT: You can eliminate that, gentlemen. If you find that there was a will, you need not inquire whether there were any witnesses to it; but if you find that Joseph Holt left a will disposing of his entire estate, as I have indicated to you, whether it had witnesses or not, it would be a sufficient revocation.

Mr. WORTHINGTON: Or that he made subsequently such a will, which was destroyed by inadvertence or accident.

Mr. DARLINGTON: Yes; destroyed by accident or (otherwise)* inadvertence.†

I note an exception to the portion of the charge where your honor told the jury that the same evidence that the will existed might or may satisfy them that it was not destroyed by the testator.

The COURT: You misunderstood me, Mr. Darlington, absolutely. There is evidence here of conversations by Joseph Holt with Washington Holt, and there are letters—I have not paid very much attention to that feature of the case—which, if I recall them correctly, referred to this matter. I would not pretend to repeat that. It seems to me that if the substance of those letters or of those communications or those declarations indicates the existence of a will at that time, then those declarations, if the jury could so infer from them, might be also evidence that would convince them that that will was not destroyed at that time, and I spoke particularly with reference to such declarations as they may find in the

281 evidence made by Joseph Holt in his last days just before his death. If he spoke then of a will as being in existence the jury might infer from that that that will was then in existence and that it had not been destroyed by him.

Mr. DARLINGTON: I think the last reference to the matter was in May, and he died in August. However, I desire to reserve the point for whatever there is in it.

Mr. WORTHINGTON: There are two or three matters which are perhaps covered by the exceptions to the prayers.

The first one is your honor's instruction that there is a presumption that there was a seal from its being stated in the will that it was "signed and sealed." That is probably covered by the exception to the refusal to grant a prayer which we asked on that subject; but, in order to avoid the difficulty which Mr. Darlington

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[* Word enclosed in parentheses erased by pencil in copy.]
[† In pencil in copy.]

spoke of, we reserve an exception to the giving of the proposition conversely.

The next one is where your honor said that there was no presumption from the burning or mutilation of the paper that it was done by Joseph Holt. That was also probably covered by the prayers, but we desire to reserve an exception to that.

Then in two of the prayers which have been granted and to which we have an exception there is used the phrase "of which there is no evidence in this case." We desire, besides excepting to those instructions, as we have already done, to except specifically to that phrase in each one of those two prayers.

Mr. WILSON: I want to make a suggestion. In the event
282 that the jury should find that the will was not executed by Joseph Holt, of course they would in answer to the first question say "No." Then to the last issue your honor instructed them that in that case they would answer "No" to that.

Now, that might bring embarrassment hereafter, and I suggest that in the event I have stated they answer, "No; because he did not execute it."

Mr. WORTHINGTON: Otherwise your honor will see what difficulty we might have, as it might be held hereafter that we are concluded by such a finding on the last issue, because it would be an absolute finding that there was no revocation.

The COURT: It seems to me the answer would be perfectly consistent, and I do not see how any trouble could arise from it. But, gentlemen of the jury, if you reach the conclusion that you should answer "No" to the first issue, which is, Did he execute this paper? then, as I have already indicated to you, you need not inquire into the evidence on the other question, but will answer that "No," and it is suggested that you answer, "No; because he did not execute it." You can do that.

(And thereupon, at 4.35 o'clock p. m., the jury retired to consider of their verdict.)

283 36″ *Excep.*

Thereupon the caveatees, by their counsel, excepted to the following portion of said charge: "That is to say, from the photograph that you have had of the character and attainments of Judge Holt by the evidence in this cause, either by his own letters or by the oral evidence of witnesses, you may judge whether it is likely or not that Joseph Holt would have composed and written the paper in controversy;" and the said exception was noted at the time upon the minutes of the court.

37″ *Excep.*

Thereupon the caveatees further excepted to that portion of said charge which instructed the jury they were to consider the subsequent conduct of the testator towards his next of kin or heirs-at-law as bearing upon the probability or likelihood of his having made such disposition of his estate as was made by the paper in controversy, and the said exception was noted at the time upon the minutes of the court.

38″ *Excep.*

Thereupon the caveatees further excepted to so much of the said charge as instructed the jury that they should consider the subsequent conduct of the testator towards the devisees under the will as bearing upon the probability or likelihood of his having made such a disposition of his estate as was made by the paper in controversy, and the said exception was noted at the time upon the minutes of the court.

284 And be it further remembered that each and every of the exceptions taken by or on behalf of the caveatees to each of the said separate and several rulings of the court during the trial and each one of said exceptions taken by or on behalf of the caveatees to the granting by the court of each of the prayers granted on behalf of the caveators, and that each of the exceptions taken by counsel for the caveatees to the refusal of the court to grant each of the prayers asked on behalf of the caveatees and which were refused by the court, and that each of the said exceptions taken by or on behalf of the caveatees to the charge of the court to the jury, as hereinbefore set forth, were so taken by counsel for the caveatees then and there, before the jury retired, separately and severally, and said exceptions and each of them were then and there separately and severally duly noted upon the minutes of the justice presiding at the trial, and counsel for the caveatees then and there prayed the court and now pray the court to sign and seal this bill of exceptions, to have the same force and effect as if each of the said exceptions had been separately and severally set forth in a separate bill of exceptions, and the same is accordingly done and this bill of exceptions signed and sealed and made a part of the record in this cause, now for then, this 30th day of June, A. D. 1897.

A. C. BRADLEY, [SEAL.]
Associate Justice.

This bill of exceptions was served on me Sept. 27, 1896.

A. S. WORTHINGTON,
Of Counsel for Caveators.

284½ Filed July 20, 1897.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Will of JOSEPH HOLT, Deceased. No. —, Admr. Doc.

It is hereby stipulated by the parties to the appeal in the above-entitled cause that the foregoing parts of the original proceedings shall constitute the transcript on appeal.

J. M. WILSON,
A. S. WORTHINGTON,
Attorneys for Appellees.
J. J. DARLINGTON,
Att'y for Appellants.

285 In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 284, inclusive, are true copies of originals in cause No. 39648, at law, *In re* estate of Joseph Holt, deceased, as the same remains upon the files and records of said court

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 28 day of July, A. D. 1897.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 712. Josephine H. Throckmorton *et al.*, appellants, *vs.* Washington D. Holt *et al.* Court of Appeals, District of Columbia. Filed Jul 29, 1897. Robert Willett, clerk.

143½ In the Court of Appeals of the District of Columbia.

JOSEPHINE H. THROCKMORTON ET AL., Appellants, *vs.* WASHINGTON D. HOLT ET AL. } No. 712. April Term, 1897.

Stipulation.

It is hereby stipulated between the parties to this cause, by their attorneys, that on the 5th day of October, 1896, an order was passed in the supreme court of the District of Columbia prolonging and extending the April term, 1896, of the circuit court until and including the 4th day of November, 1896, for the purpose of settling the bill of exceptions in the above cause, the said order having by an inadvertence been omitted from the transcript of record filed in this cause.

J. J. DARLINGTON,
Att'y for Appellants.
A. S. WORTHINGTON,
J. M. WILSON,
Att'ys for Caveatees.

Endorsed: Court of Appeals D. C., April term, 1897. No. 712. Josephine H. Throckmorton *et al.*, appellants, *vs.* Washington D. Holt *et al.* Stipulation of counsel as to prolonging term for settling bills of exceptions. Court of Appeals, District of Columbia. Filed Aug't 12, 1897. Robert Willett, clerk.

144 WEDNESDAY, *April 6th, A. D.* 1898.

JOSEPHINE H. THROCKMORTON and LUKE DEVLIN, Appellants, *vs.* WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, Her Guardian; Robert S. Holt, Thomas Holt, and James Holt. } No. 712.

The argument in the above-entitled cause was commenced by Mr. J. J. Darlington, attorney for the appellants, and was continued by Mr. A. S. Worthington, attorney for the appellees.

THURSDAY, *April 7th, A. D.* 1898.

JOSEPHINE H. THROCKMORTON and LUKE DEVLIN, Appellants, *vs.* WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, Her Guardian; Robert S. Holt, Thomas Holt, and James Holt. } No. 712.

The argument in the above-entitled cause was continued by Mr. J. M. Wilson, attorney for the appellees, and was concluded by Mr. Wm. G. Johnson, attorney for the appellants.

145 JOSEPHINE H. THROCKMORTON and LUKE DEVLIN, Appellants,
vs.
WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET BOWMER, JOHN W. HOLT, LOCKIE W. IGLEHART, SARAH HOLT, by JOHN W. HOLT, Her Guardian; ROBERT S. HOLT, THOMAS HOLT, and JAMES HOLT. } No. 712.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the District of Columbia, holding sessions for orphans' court business, refusing probate of an instrument offered therefor as the last will of Joseph Holt, deceased.

The said Joseph Holt, who had been a distinguished lawyer and was generally regarded as an accomplished speaker and writer, was born in the State of Kentucky, in 1807. He came to Washington in 1859 to accept the position of Postmaster General in the cabinet of President Buchanan. Later he became Secretary of War in the same cabinet, and remained until the inauguration of President Lincoln. In 1864 he was appointed judge advocate general of the Army of the United States, from which he retired in 1875. He continued to reside in Washington after his retirement. He had been twice married, but had no children. His first wife, Mary Harrison, who died in 1846, was the first cousin of Elizabeth Hynes, one of the legatees of the will offered for probate. In 1850 he married Miss Wickliffe, who died in 1860. She, it appears, was the cousin of the mother of Josephine Holt Throckmorton, the other legatee named in said will. The latter was also the god-daughter of deceased.

He had several brothers and sisters, all of whom predeceased him, leaving children who are the appellees herein. One of these, a citizen of Texas, had been living in the city of Washington for several years before his uncle's decease; others lived in Kentucky, Indiana and Mississippi.

Judge Holt lived alone, attended by several servants, who had been some years in his employ. Immediately after his death, the nephew living in Washington, William G. Sterrett, went to the house with his wife, and, on the next day, was joined by another nephew, Washington Holt, who lived in Kentucky.

Pursuant to directions given them by deceased shortly before his death (as they testified), the servants delivered his private keys to Washington Holt. Search was made by Holt and Sterrett among the papers of deceased in the house for a will. They testify that no will was found, and that the only thing of a testamentary nature discovered was an unsigned memorandum of a bequest of "— dollars" to the Washington Humane Society. This had no date, but must have been made after February 13, 1885, as that is recited therein as the date of the act of Congress incorporating said society.

It appears that deceased had preserved his papers and letters with great apparent care. They were found in packages carefully indorsed, and there was testimony tending to show that in his last years, when his sight was impaired, he could direct his servants where to find a package that he wanted. Memorandum books were found showing careful entries of trips taken and expenses paid, and one contained entries of daily expenditures.

After or during this search for a will, the nephews say that they caused to be burned in the yard, by one of the servants, some old letters to deceased from Washington Holt and his family; and some old newspapers and circulars were burned in the fireplace in one of the rooms of the house.

Some days later, at the request of Washington Holt, the register of wills searched the house carefully, but found no will. An employee of the register's office made a search also without success. He saw the evidence of the burning of papers in the fireplace and yard, and suggested the sealing of all papers, which was done.

146 Deceased had a box in the vault in the National Safe Deposit Company of Washington, in which some papers were kept. The trust officer of that company examined these, and found a will bearing date April 9, 1848, and a memorandum on a rough piece of paper as follows:

"Humane society, $1,500.
Children's hospital, 4,000.
Lodging-house, 1,500.
Emergency hospital and dispensary, 1,500.
Associated charities, 1,500."

No will having been found, on August 17, 1894, Washington Holt, William G. Sterrett and John Holt, filed a petition for letters of administration, which resulted in the appointment of the National Safe Deposit, Savings and Trust Company, of the city of Washington, as administrator.

The paper offered for probate in this case as the last will of Joseph Holt made its appearance in the following manner:

It was received by the register of wills in the morning mail delivery, August 26, 1895, enclosed in an ordinary envelope of "official" size, together with a piece of pasteboard. There was no other enclosure, and nothing to indicate the source from which the document came. The address—"To the register of wills, D. C."—was in large irregular letters, after the form of print, made with pen and ink.

The postmarks on the package indicated that it had been deposited in one of the many mail boxes situated in the northwest quarter of the city of Washington, and had been delivered at the general post-office 6 p. m., August 25, 1895.

The paper, when received, showed signs of mutilation by burning and tearing; the place where the seal would appear, if affixed as indicated in the recital of the next to the last line, was roughly torn away. It purports to have been "signed and sealed" on February 7, 1873. There is no attestation clause before the signature of the three witnesses, Ellen B. E. Sherman, U. S. Grant and W. T. Sher-

man. These follow the name of the testator, with a slight interval between his and the first of them. Ellen B. E. Sherman was the wife of W. T. Sherman, who was then General Commanding the Army of the United States, and U. S. Grant was then President.

The paper was torn nearly, if not entirely, across the page between the signature of the testator and that of the first witness. There was testimony tending to show that the separation was complete; but the weight of the evidence tended to show that it was not entirely separated at one end. A photo-lithographic copy of this will, as it then appeared, is found in the record, which fairly represents its appearance and condition, save in respect of the severance of the paper and the mutilation where the seal is supposed to have been.

(It is here reproduced.)

2932 3

FOLD OUT IS TOO LARGE TO BE FILMED

147 No testimony was produced during the trial tending to shed any light upon the mysterious appearance of this will. All the parties disclaimed any knowledge of its existence until the news of its receipt by the register of wills had been published.

The executor, Luke Devlin, filed his petition to probate the instrument as the last will of the deceased, and for letters testamentary on September 20, 1895. The appellees, as next of kin, filed their caveat October 18, 1895, and answer thereto was filed December 2 by Luke Devlin, the executor, and Misses Elizabeth Hynes and Josephine Holt Throckmorton, the two legatees named in the said will.

On March 20, 1896, the following issues were made up in the orphans' court and transmitted to the special term holding the circuit court for trial by jury:

"1. Was the paper-writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?

"2. Was the execution of said paper-writing procured by fraud exercised and practiced upon said Joseph Holt by any person or persons?

"3. Was the execution of said paper-writing procured by the undue influence of any person or persons?

"4. If the said paper-writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by said testator?"

The proponents, or caveatees, proved the death of the subscribing witnesses, and then offered testimony tending to establish the genuineness of their signatures as well as that of the testator. Senator John Sherman testified to the genuineness of the signature of his brother, General Sherman; Col. Frederick D. Grant to that of his father, President Grant; and P. Tecumseh Sherman to that of his mother, Mrs. Ellen B. E. Sherman. The latter also testified that Mrs. Sherman usually wrote her name, "Ellen Ewing Sherman;" but that it was her habit to sign legal papers "Ellen B. E. Sherman," as it appears on said will. Henry B. Burnett gave his opinion that the body of the will and the signature of the testator were written by Judge Holt.

The will was then read to the jury. Miss Hynes and Miss Throckmorton each testified that she had not heard of the said will until after its appearance in the office of the register of wills. The executor, Luke Devlin, was then examined, and testified as follows:

"That the said paper-writing was never in his possession, and that he first saw it in the office of the register of wills on the day it had been received there. On cross-examination the said Devlin testified that he knew the said Joseph Holt well since 1862, having been a copyist and messenger at that time in the office of the judge advocate general when said Holt succeeded to that office; that he continued to be employed in said office until 1876, when the said Holt retired therefrom; that he had little communication with him in relation to office matters; that he visited him once or twice at his house; that he was in the habit of meeting him socially at the

residence of Mrs. Throckmorton, Sr., the grandmother of Miss Josephine H. Throckmorton, from 1865 to 1878; that he had not seen Mrs. Throckmorton, Sr., more than four or five times during a period of ten years preceding the receipt of the will at the register's office, and on learning of the existence of the will he had to consult the city directory to ascertain where she then lived; that on
148 the day the will reached the register of wills he received a telephone message from the register, went to his office, and saw the will for the first time; then called on Mrs. Throckmorton, Sr., and on the same day telegraphed Miss Josephine H. Throckmorton of the finding of the will, having first learned the address of her father upon inquiry at the War Department; that he called on several occasions in later years at said Holt's house and was informed by the colored servants that he was out or that he was engaged, and asked witness to call again, the last of these visits being about April 9, 1894, shortly before his death; that he met said Holt outside on several occasions, the last of which was about two years before his death, and conversed with him."

Caveatees then announced that their *prima facie* case was closed counsel for the caveators objected that it was incumbent upon the caveatees to introduce all the testimony essential to the establishment of the will before they should be called upon to reply. The court ruled that because of the fact that there was no attesting clause to the will, it was proper and necessary for the caveatees to offer all the evidence they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt. Caveatees acquiesced in this ruling as within the discretion of the court, and offered a number of witnesses, who testified to familiarity with the handwriting of the testator, and expressed the opinion that he wrote both the body of the will and the signature thereto.

Caveators introduced a number of witnesses, also familiar with testator's handwriting, who testified that in their opinions the will and signature of testator were not genuine.

One witness, who had been a clerk in the War Department for thirty years, expressed the opinion that the signatures of President Grant and General Sherman were not genuine.

Three experts in handwriting expressed the opinion that the signature of Mrs. Sherman was not written by her. These were contradicted by an equal number of experts on behalf of the caveatees. A great many genuine letters and documents written by deceased were read in evidence and exhibited to the jury. Among these was his own will, dated April 9, 1848, and one written by him for Miss Hynes about January 1, 1886.

Testimony was offered by the caveators of declarations made by testator, after the date of the said will, tending to show his feelings, sentiments and conduct in relation to his next of kin and to the father and grandmother of Miss Throckmorton; as well as his intentions in respect of the disposition of his estate. This evidence was all objected to by the caveatees, and exceptions were taken to its admission. Caveatees also introduced evidence tending to show intimate and affectionate relations between the testator and Misses

Hynes and Throckmorton, the legatees. He had made regular gifts of money to the former for years, and in 1884 gave her $10,000 in six per cent. bonds of the District of Columbia.

No evidence having been introduced in support of the second and third issues, relating to the procurement of the execution of the will by fraud and undue influence, the court instructed the jury to return the answer "no" to each.

The jury returned a verdict answering "no" to the enquiry whether the will was executed by Joseph Holt.

To the fourth question, whether Joseph Holt had revoked the said will, if in fact executed, the jury answered "no," because it was not executed.

The findings of the jury were duly certified to the orphans' court, and in accordance therewith, on July 10, 1896, the order was made denying probate.

The leading question in the case arises on the several assignments of error relating to the admission of evidence tending to show the relations of testator, after the date of the will, with his next of kin and the family of one of the legatees, his sentiments and feelings towards them, and his intentions in respect to provisions for them in the disposition of his estate.

As we have seen, evidence introduced without objection tended to show the great and constant affection of the testator for Miss Hynes, whom he had chiefly supported for years. Miss Throckmorton was the testator's god-daughter, her mother was his second wife's cousin, and her father had in youth been his protégé.

The will in controversy divided his entire estate between Miss Hynes and Miss Throckmorton; the share of the latter to be held in trust by her father until she attained the age of twenty-one years.

There was also testimony tending to show that the testator had become alienated from some of his next of kin because they had espoused the cause of the South during the civil war. Letters were also introduced from the testator to two of his brothers and several nieces, written between 1867 and the date of the will, tending to show the existence of affection for and interest in them.

The testimony to which the exceptions apply may be summarized as follows: (1) Correspondence between testator and certain of his next of kin during the years that followed the date of the will, tending to show the existence of an affectionate interest in them. (2) Visits made by testator to Washington Holt at the old family home in Kentucky; his expressions of affection for his nephew and family. (3) Gifts of land adjoining the home of Mrs. Washington Holt; the erection of costly improvements on the old home place, and the further gift to her of $40,000 in Missouri State bonds. (4) Declarations of testator in 1881 showing anger with the Throckmorton family. On one occasion, when asked of them, he said angrily, "I do not know the Throckmortons." (5) Instructions by testator to his servants not to admit the Throckmortons to his house; and his conduct at a levee of President Arthur in refusing to speak to Major Throckmorton and turning his back upon him. (6) Dec-

larations of testator between 1884 and 1893 that he had made Washington Holt his executor; that all he had would be his, and that he would arrange testator's burial; instructions to the servants to turn over his keys to Washington Holt, as he would have charge of his affairs, etc. (7) Some other declarations of similar purport, among them one made in 1893 to one Barclay to the effect that he had made a will and therein given some pictures to Barclay's mother.

149 All of this evidence was offered in support of the issue of forgery as well as of that of revocation, and was objected to on both grounds.

The twelfth and thirteenth prayers of caveatees relating to the bearing of a part of the same on the issue of revocation were excluded:

"12. The jury are instructed that they cannot consider alleged oral declarations of Joseph Holt to the effect that he had made a will creating Washington Holt his executor, or alleged declarations to the effect that Joseph Holt had made a will in Washington Holt's favor as showing or tending to show revocation of any will which the jury may conclude from the testimony was duly executed by the said Joseph Holt prior to such declarations.

"13. The jury are instructed that they cannot consider any letters or writings offered in evidence, not themselves testamentary in character or not being in effect a last will and testament, for the purpose of showing or tending to show revocation of any will which the jury may conclude was duly executed by the said Joseph Holt prior to the date of such letters and writing."

The court granted the following prayer of the caveators applying to the same issue:

"4. As to the question of revocation the jury have the right to consider such burning and mutilation of the paper-writing in controversy as they may be satisfied from the evidence existed when it reached the office of the register of wills, together with all the evidence in the case tending to show any change occurring after February 7th, 1873, in the relations of the testator either to the persons named as beneficiaries in the alleged will or any of them or to those who would be entitled to his estate under the law if he had died intestate, and if the jury are satisfied from all this evidence taken together that such burning and mutilation was done by Joseph Holt or by his directions with the intention of revoking the same, then the jury are instructed that they should answer the fourth issue, 'Yes.'"

Further instructions, prayed by the caveatees, relating to the issue of revocation, by mutilation, and so forth, the burden of proof thereon, and the effect of a subsequent will or paper-writing thereon, were given to the jury.

1. No special instruction relating to the particular bearing of the evidence of declarations and conduct of the testator, upon the question of forgery exclusively, seems to have been prayed for by either party. Because of the omission of the caveatees in this respect, the caveators contend that its effect cannot now be complained of. They

contend that, being clearly admissible as bearing on the revocation of the will by mutilation, it was not the duty of the court to restrict its consideration to that issue, unless called upon by the interested party to do so.

Ordinarily, this would be the correct practice. But it is not necessary to consider whether the circumstances of this case would constitute an exception; because we think it sufficiently appears, from a paragraph of the general charge, taken in connection with the express purposes for which the evidence was offered, that it was intended to bear distinctly also upon the issue of execution.

That paragraph, to which exception was duly taken by the caveatees, reads as follows:

"You are also to consider the circumstance touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this will, up to the time of the date of this will, bearing directly upon this question whether it would be likely that he would have made such a will at that time, and also the subsequent conduct of the testator towards his next of kin or heirs-at-law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood, of his having made such disposition of his estate as is made by this paper in controversy.

"If, upon the consideration of all of this evidence, you reach the conclusion that this paper is not established to your satisfaction as the genuine paper of Joseph Holt, your answer to this first issue should be 'No.' If the evidence positively satisfies you that he did not execute it, your answer should also be 'No;' for the question is, Was it executed by him?"

It is proper to add also, as bearing upon the weight of this evidence with the jury, the following paragraphs from the general charge:

"It is your province, gentlemen of the jury, to pass upon the evidence, and it is your duty to base your conclusions absolutely and solely upon the evidence. It is not your province to make a will for Joseph Holt, if in your judgment you should be satisfied that he ought to have made a different will from the will in controversy. It is not your province to unmake a will, unless the evidence is of such character as to satisfy you either that Judge Holt did not execute this paper, or, if he did execute it, that he subsequently revoked it.

"In passing upon these questions you should be influenced by no other motive than the desire to reach the exact truth. Let justice be done, no matter who is injured by your verdict. You are not responsible for the outcome of this case. It matters not to you, and it should not make any difference as to your conclusions upon the evidence in this case, whether the result will indicate prevarication or perjury on the part of any witness who has been examined in your hearing, whether that witness be high or low socially. It matters not to you, and you should not permit these considerations to influence your judgment to the slightest degree, what may be the subsequent outcome of this case, who will be injured by your

verdict, either pecuniarily or who ultimately may be subjected to criminal prosecution. It is not your province to determine, if this will is not genuine, by whom it was forged. Your province is to determine, simply, is it the genuine instrument of Joseph Holt? If it is the genuine instrument of Joseph Holt, then, as I have indicated to you, it is not your business that the devise to these beneficiaries may cut out the next of kin and the blood relations of Joseph Holt.

"With the consequences you have nothing to do. Do not permit considerations of expediency or of sympathy for any one to enter into your deliberations. Render your verdict in accordance with the conclusions to which the evidence compels you, and let the consequences of such verdict adjust themselves and rest where they may."

2. It seems to us quite clear, both on principle and authority, that this evidence, including the declarations of the testator tending to show, after the date of the will, renewed and increased affection for his next of kin, as well as estrangement from the family of one of the legatees, and an independent provision for the remaining legatee, for whom his affection remained unabated, was competent as tending to maintain the issue of revocation.

If the will had been found among the papers of the testator unmutilated, the evidence would clearly have been incompetent to prove revocation as an independent fact. If it had been there found, in its present condition, the presumption of revocation would at once attach. Coming to light at the time and in the manner in which this paper did, we are not sure but that the same presumption of revocation ought to be indulged.

Certainly it would be more just and more consistent with the reasons for the ordinary presumptions of law, to presume that the paper had remained under the control of the testator and had been spoliated by him, as he had the lawful right to do, rather than by a stranger, who, in suppressing or defacing the will of another, commits a heinous offense. The charge of the court, without expressly declaring the existence of a presumption under the circumstances of this case, nevertheless imposed the burden of proof upon the caveators to show that the acts of spoliation had been committed by the testator with the intention to revoke. The evidence to maintain this burden was necessarily circumstantial.

In consideration, then, of the condition of the will and the manner in which its appearance was made, we cannot escape the conviction that the state of mind of the testator, during the more than twenty years in which the will was subject to his unrestrained control, as indicated by his changes of feeling towards the parties at interest, was a material circumstance to be considered by the jury in determining whether the mutilation was the result of an intent to revoke. Lawyer *v.* Smith, 8 Mich., 411, 423; Patterson *v.* Hickey, 32 Ga., 156, 164; Burge *v.* Hamilton, 72 Ga., 568, 625; Callagan *v.* Burns, 57 Me., 449; Collyer *v.* Collyer, 110 N. Y., 481, 484; McDonald *v.* McDonald, 142 Ind., 55, 81; Miller *v.* Phillips, 9 R. I., 141, 144; *In re* Valentine's will, 93 Wis., 45, 55; Pickens *v.* Davis, 134 Mass.,

252; Sugden *v.* Lord St. Leonards, L. R. 1 Prob. Div., 154, 176, 219, 225, 232, 241; Gould *v.* Lakes, L. R. 6 Prob. Div., 1, 5.

3. This brings us to the consideration of the important question that has been chiefly argued by counsel, namely, whether the foregoing evidence was competent for the consideration of the jury in determining the issue joined on the genuineness of the will.

In that consideration, it must be remembered that the subscribing witnesses had long been dead; that the genuineness of their signatures had been supported and attacked by competent and respectable evidence in the nature of opinions; and that whilst many witnesses had expressed opinions in favor of the genuineness of the will and the testator's signature thereto, many others of equal credibility, apparently, and opportunities to know the handwriting of the deceased testator, had pronounced against both as forgeries. In addition, we have the mysterious, unexplained deposit of the instrument in one of the public mailing boxes. The jury were required to find if Joseph Holt actually wrote this will and affixed his signature thereto.

The contention of the appellants is supported by the citation of many cases denying the competency of such evidence, especially the subseqent declarations of the testator, on that issue.

The rationale of decision in a considerable number of these might, probably, be reconciled with the decision of competency under the exceptional circumstances of this case; but it would serve no useful purpose to occupy time with their review and the discussion of their respective weight. As the question is one of first impression in this jurisdiction, we are free to adopt the conclusion that seems to us to be the most reasonable, and that accords with the smaller number of cases relied on by the appellees. In one of these, whose analogy is striking, the court of appeals of Maryland, after much consideration of the principles involved, as well as the authorities, declared the evidence competent. Hoppe *v.* Byers, 60 Md., 381, 390. See also the charge of Mr. Justice Grier to the jury in Turner *v.* Hand, 3 Wall., Jr., 88, 92; Stevens' Dig. Evidence, art. 29.

We do not mean to say that such evidence would be competent to establish the execution and existence of an undiscovered will, any more than to prove the revocation of one actually produced without sign of spoliation; for that would be, in either case, to override the provisions of the statute law prescribing the formalities of execution and revocation. Nor would the same evidence be of sufficient weight to warrant the overthrow of a formal will produced and with execution proved by living witnesses of unimpeached credibility.

In fact, it was said in Hoppe *v.* Byers, *supra*, that under circumstances like those just mentioned, the evidence ought to be excluded. But, whether, in such event, the objection would lie to its competency or its credibility, the evidence would have so little weight that, if admitted, the court might properly charge the jury that it could not afford support for a verdict against the will. The difficulty in the accurate reproduction of oral declarations, as well as the danger of the jury being biased or prejudiced thereby, and therefore misled, seem to constitute the chief grounds of objection

to the competency of this kind of evidence; but the same dangers lurk, though in less degree, in all oral evidence of declarations, admissions and confessions of parties against their own interests. In respect of this, we concur in the views expressed by Mr. Justice Lumpkin, in Patterson *v.* Hickey, 32 Ga., 164, as follows: "It is said that the reason for not hearing parol proof is, that there is not the ordinary security that it is true. This goes to the weight of the evidence. It is true, there are many cases in which it would be entitled to but little weight; nay, but a few in which it would be entitled to any. Yet, if there be others, in which it would subserve the cause of truth and justice, it must be heard, leaving its
151 effect to those whose province it is to weigh it. There is little danger in this, when the courts can aid the jury in pointing out its legitimate tendency."

Because, too, one who has executed and delivered a deed or a bond cannot, by subsequent declarations, impeach its execution and obligation, it has been said, in many of the cases, that the same principle applies in the case of a will. In this we cannot entirely concur. In the case of the delivered deed and bond the interest of the signer becomes wholly changed, and he cannot be heard to disparage the title of the other party by declarations in his own interest. But the will is a radically different instrument; it is not made effective by delivery; it is ambulatory, and can take effect only upon the death of the testator; until then only is it beyond his power of recall by destruction, express revocation, or complete substitution by one of later date. By virtue of the statutory requirements in these respects, declarations before, at the time of, or subsequent to, the transaction enquired of, cannot be received as sufficient to establish the same; nor should they be permitted to override positive, unimpeached proof of execution or revocation in accordance with the required formalities. But in a case where such proof is lacking, or where, by competent evidence, the genuineness of the signature has been assailed to such an extent as to require the submission of the question of its forgery to the jury, we think the feelings of the testator towards all the parties, and his relations with them and apparent intentions as disclosed by his conduct and declarations, are competent for their consideration. We agree with the court of appeals of Maryland, that "they are not to be taken as direct proof to establish the paper (or to destroy it), but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence has been first given, proper for the consideration of the jury." 60 Md., 393.

Substantially the same views were expressed by Mr. Justice Grier, who presided in the circuit court on a trial involving the same will that was in controversy in the case greatly relied on by appellants. Boylan *v.* Meeker, 28 N. J. Law, 274. He said, in charging the jury (Turner *v.* Hand, 3 Wall., Jr., 88):

"While it is undoubtedly true that parol declarations of a testator made before or after executing his will ought not to be received as a ground for altering or annulling it, yet cases *may* arise where such declarations, in connection with other circumstances, may be taken

into consideration, as, for example, where there is strong evidence of conspiracy and of fraud practiced on the testator, or that the instrument is forged and false.

"In order to elucidate this principle let us suppose a case. A will is produced in court, regularly proved according to law, yet notwithstanding the legal proof it may possibly never have been seen by the testator, never have been signed and sealed by him, and consequently does not contain his will as to the disposition of his property. Suppose it to have been made (as has sometimes been the case in Ireland and other places) by some person personating the testator, and simple and perhaps honest people have thus been prevailed upon to attest it. In such a case the signatures may be so palpably a forgery as at once to detect the fraud to any judge of handwriting. Again, suppose the will disinherits a child, a grandchild, or other relative, who has been the favored and beloved companion of the testator's life, whom he had uniformly pointed out and always and invariably, through his whole life, declared his intention of making his heir, and in whose favor a prior will was duly executed. Suppose the devisee in this supposed will was some worthless fellow, unknown to the testator, or, if known, despised or abhorred by him. Suppose the witnesses to be of the same character, low and degraded, with whom the testator never associated. Would not such facts, if clearly proved, condemn such instrument in the mind of every rational man? Would not the moral impossibility that the testator could ever have made such a disposition of his property be sufficient to outweigh the positive testimony of such witnesses?

"It is easy to forge the handwriting of almost any man so that it may be almost impossible for the best judges to discriminate between the false and the true, and it is too true that persons may be found willing, for a sufficient consideration, to swear to any statement of facts. Fraud can be generally proved only by circumstantial evidence. A number of distinct facts, clearly proved, may be so utterly inconsistent with the truth of the instrument as most satisfactorily to establish the fraud. The fact that the testator had uniformly, through his whole life, declared that he intended a certain relative to be his heir, that he made his will in his favor, may be an important link in the chain of circumstances from which fraud, perjury, conspiracy, and forgery may be clearly proved."

See also remarks of Jessol, M. R., on the competency of declarations in general, in Sugden *v.* Lord St. Leonards, L. R. 1 P. D., at page 241.

Again, we are unable to perceive a distinction in principle between the competency of declarations in a case like this where the fact of execution is in question, and in one where the will is assailed as the product of fraud and undue influence. In the latter case, the authorities generally concur in holding that the declarations of the testator and his relations with the parties are competent circumstances tending to throw light upon his state of mind and disposition. The only limitation is, that it shall not be received as proof of the independent fact or the truth of the things declared, but as

suppletory only to direct proof of the alleged fraud and undue influence. Some of these cases show the admission of such declarations upon very slight foundation of the direct proof first required. Stephenson *v.* Stephenson, 62 Iowa, 163; Lane *v.* Moore, 151 Mass., 87 (gift by endorsement and delivery of note). See also Parsons *v.* Parsons, 66 Iowa, 754, 758; Woodbury *v.* Woodbury, 141 Mass., 329, 334.

The question at issue in each class of cases is practically the same: Did the testator execute the paper of his own accord? Did he execute it at all? And the danger that the jury answering either question may give undue weight to the declarations and conduct of the testator is equal. All that the court can do, under
152 the circumstances, is to caution the jury against such conduct, as was done in this case, and to set aside the verdict when convinced that the caution was unheeded.

In the peculiar conditions of this case, it seems to us that any evidence from which it might be inferred that the testator would, or would not, have made such a will, would be a material aid in resolving the doubt created by the other evidence whether he did or did not write and sign it. If the proponents had produced a witness of undoubted veracity and disinterestedness, who could testify to declarations of the testator referring to and certainly identifying this particular will as having been written, signed and witnessed, as it appears to be, would not its reception and consideration have been in accord with the dictates of reason and justice?

In order to prevent injustice, courts have even permitted the declarations of the testator to be given as suppletory proof of legal execution where a subscribing witness has either forgotten the facts stated in the attestation, or testified in denial of the same (will of Cottrell, 95 N. Y., 329, 337; Beadles *v.* Alexander, 9 Baxter, 604); and also where it appeared doubtful if the formalities of the law had been complied with in the execution of a codicil. Adams *v.* Norris, 23 How., 353, 368.

Why, then, for the same reason, should not testimony be received from which the jury might, in case of doubt, infer that the testator had not written or executed the instrument at all? Would it not be important to know the character and state of mind of the testator in such a case? If a man of education and character, was he in a condition, mental or otherwise, to induce him to dissemble his affections and feelings for the parties or any one of them? Was there any cause or reason why he should falsely express his affections or dislikes, or should undertake to create hopes and expectations in the minds of his next of kin that he knew would be cruelly disappointed by the production of this will made years before? In short, what was the real state of the testator's mind and feelings before, at and after the alleged date of the execution, in relation to his property and the conflicting objects of his bounty?

The materiality of this inquiry, under the circumstances surrounding this will, seems plain to us.

The length of time of the declarations after the date borne by the instrument is of no materiality; for if the instrument be a forgery,

the person procuring it would naturally give it a date when the disposition would seem more reasonable or more in accord with the testator's sentiments than at a later period; besides it would be a reasonable precaution to antedate a well-known change therein.

4. It follows from what we have heretofore said, that testator's declarations tending to show the making of a will in Washington Holt's favor, or appointing him his executor, were not competent to prove the execution of such a will either as a disposition of the estate or as a distinct revocation of the will offered for probate. They were admissible, and seem to have been admitted, only as one among other circumstances tending to show the state of mind of the testator and shed light upon the issue of revocation, by mutilation, of the will offered for probate; and as such we have held them admissible on the issue in respect of forgery also. The court gave a number of instructions asked by the caveatees respecting the effect of the proof of a supposed later will, and none seem to have been prayed by the caveators. Had the twelfth and thirteenth prayers of the caveatees been modified so as to thus limit the weight or effect of this evidence of a different will, it would have been the duty of the court to grant them. If, however, palpable error had been committed in this respect, the judgment would not be reversed, because it stands upon the verdict finding the will to be a forgery. Having so found, the jury could only answer the remaining question as they did—not revoked because never executed.

5. The next question arises on exceptions taken to the action of the court in permitting witnesses for the caveators to express opinions, founded upon their knowledge of the legal attainments and literary culture and style of the testator, that the will had not been written by him; and also in excluding like evidence when offered in rebuttal by caveatees.

Many genuine letters and documents of the deceased were in evidence for the consideration of the jury. Evidence was also given showing peculiarities of testator in the matter of punctuation.

Among the witnesses who expressed opinions against the genuineness of the will and signature of the testator were several who said, in addition, that they had the same opinion because of the style of the composition. One testified that this was the chief ground of her opinion.

Two of them, officers who had served with the testator in the office of the judge advocate and were familiar with his handwriting, testified to the depth of his legal learning and the excellence of his English composition. One of these said of him: "He had the clearest power of expression and was the finest rhetorician witness had ever met." Both criticised the word "inherit" as used inartificially in the will, and one of them said he did not think the testator would so use the expression.

Attention has been directed, on the argument, to the words following the recital of the name of the executor, Luke Devlin: "Whose character I believe to be of the highest standard;" but we do not find that any witness referred to them.

In the course of their rebuttal, the caveatees proved by John A.

Bingham, long and intimate acquaintance with the testator and familiarity with his handwriting, style of composition and general attainments. But the court refused to permit him to express an opinion in favor of the genuineness of the will and signature, formed upon either or both grounds.

It will be remembered that when caveatees first closed their case they were admonished by the court that the rule in respect of rebuttal evidence would be rigidly enforced; and that they thereupon withdrew the announcement and examined a number of witnesses whose opinions were that the will and signature of testator were genuine. It does not appear that there was any reason why this witness could not have been called on the matter of the handwriting simply, in the opening.

153 (1) Questions in respect of the order of the introduction of evidence are matters of such broad discretion with the trial courts that its exercise will not be disturbed except when abused. Lansburgh *v.* Wimsatt, 7 App. D. C., 271, 276; Olmstead *v.* Webb, 5 App. D. C., 38, 57; First Unitarian Church Soc. *v.* Faulkner, 91 U. S., 415, 418.

(2) If there was error in refusing to permit evidence by this witness in rebuttal of the opinions founded on the testator's style of composition, it was cured by the subsequent action of the court.

For the same reason, it is not necessary to determine whether the opinions of witnesses concerning the genuinenesss of a writing are admissible when founded wholly or in part upon their knowledge of the technical learning, culture and literary style of the alleged writer.

It appears that when the case was closed, the court instructed the jury to disregard all opinions as to the falsity of the papers, founded "either wholly or in part upon the character of the composition, or upon any other circumstance than the handwriting alone."

We are not prepared to admit as clear, that evidence of opinion in respect of the authorship of a paper-writing by a competent judge familiar with the learning, culture and literary style of the alleged writer, is not equally competent and credible with that based solely upon knowledge of handwriting. But, conceding its incompetency, the error was corrected by the charge withdrawing it from the consideration of the jury. This rule of practice is well settled in the courts of the United States if not elsewhere. Pennsylvania Co. *v.* Ray, 102 U. S., 451, 458.

It is only in a clearly exceptional case that error will be considered when assigned on the admission of incompetent evidence that has subsequently been withdrawn from consideration by the charge of the court. Hopt. *v.* Utah, 120 U. S., 430, 438; Waldron *v.* Waldron, 156 U. S., 361, 383. Those exceptional conditions are not found here.

6. The last exception, upon which error has been assigned, also relates to the exclusion of evidence offered by caveatees in rebuttal.

In opening their case, they offered P. Tecumseh Sherman as a witness, and he expressed the opinion that the signature of his mother, Mrs. Ellen B. E. Sherman, was genuine. He was not called

upon to give an opinion as to the genuineness of the signature of his father, General W. T. Sherman. That was proved by Senator John Sherman.

Caveators introduced a witness, John B. Randolph, who testified that he had been employed for more than thirty years in the office of the Secretary of War, during which time U. S. Grant and W. T. Sherman had each acted as Secretary of War, and the latter had been General of the Army. During this service he had become familiar with their signatures, and had recently re-examined them. In his opinion neither signature attached to the will was genuine. On cross-examination, among other specifications of peculiarities in the genuine signature of General Sherman, he said that, "in the long quirl to the capital T the upper and lower lines met," and that he had "never seen one in which they had not met." Subsequently he said that "in four out of five" genuine signatures observed by him, the upper and lower lines of this "quirl" met. (They do not meet in the signature attached to this will; see copy.) He also thought the loop in the S was larger than usual.

Caveatees, in rebuttal, offered to prove by the witness, P. Tecumseh Sherman, that this failure of the lines to meet was "by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found therein;" and also that loops at the bottom of the S as large as that in the signature to the will were also usually found. The court excluded this evidence, on the objection of caveators that it was not competent rebuttal.

Referring again to the express and timely notice heretofore mentioned as given by the court as regards the order to be observed in the introduction of the evidence of handwriting, which was acquiesced in by the caveatees, and considering the fact that this witness, though examined in the opening, had not been asked a question concerning this signature, we think it was within the discretion of the court to exclude his testimony.

We have had some doubt whether that part of it referring to manner of making the "quirl" was not admissible as tending to rebut that part of the witness Randolph's testimony. Had Mr. Randolph testified that the peculiarity mentioned by him invariably appeared in the genuine signature of General Sherman; or had the witness offered in rebuttal examined the signatures of General Sherman in the office of the Secretary of War and been prepared to state that they did not show the peculiarity mentioned by Randolph, the evidence would have been competent in rebuttal.

But Randolph did not say that this was invariable. He gave the proportion of its occurrence as about "four out of five." This might have been true as regards the signatures examined by him, and not true of those most familiar to the son of General Sherman.

What the latter proposed to state was that this continuous opening between the lines was not an unusual feature of the signatures familiar to him. What the former had said was, that, in the proportion of four to one, the signatures with which he was familiar did not show this continuous opening, and it does not appear that

it was proposed to contradict this statement directly by the evidence offered in rebuttal.

Whilst inclined to the opinion that the discretion of the court might well have been liberally exercised in favor of the admission of this evidence, we do not think that its exclusion, considering, too, the indirect and slight contradiction between it and the evidence of Randolph, was an error for which the judgment should be reversed.

We are of the opinion that the judgment should be affirmed, with costs; and it is so ordered. *Affirmed.*

154 TUESDAY, *May 3d, A. D.* 1898.

JOSEPHINE H. THROCKMORTON and LUKE Devlin, Appellants, *vs.* WASHINGTON D. HOLT, WILLIAM G. STERETT, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, Her Guardian; Robert S. Holt, Thomas Holt, and James Holt.	No. 712, April Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 3, 1898.

155 FRIDAY, *May 13th, A. D.* 1898.

JOSEPHINE H. THROCKMORTON and LUKE DEVLIN, Appellants, *vs.* WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, Her Guardian; Robert S. Holt, Thomas Holt, and James Holt.	No. 712.

On motion of Mr. William G. Johnson, attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving a supersedeas bond in the sum of ten thousand dollars.

156 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before

you or some of you, between Josephine H. Throckmorton and Luke Devlin, appellants, and Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, appellees, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

157 *Bond.*

Know all men by these presents that we, Josephine H. Throckmorton, of the city of New York, State of New York, as principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, having its principal office at the city of Baltimore, in said State, and having fully complied with the requirements of chapter 282 of the Revised Statutes of the United States, entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," passed August 13th, 1894, as surety, are held and firmly bound unto Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt in the full and just sum of ten thousand dollars ($10,000), to be paid to the said Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals. Dated this fourth day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Josephine H.

Throckmorton and Luke Devlin and the said Washington D. Holt William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W Iglehart, Sarah Holt, John W. Holt, her guardian; Robert S. Holt Thomas Holt, and James Holt, a judgment was rendered against the said Josephine H. Throckmorton and Luke Devlin, appellants therein, and the said Josephine H. Throckmorton and Luke Devlin having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W.
158 Iglehart, Sarah Holt, John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Josephine H. Throckmorton shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPHINE H. THROCKMORTON.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
HENRY B. PLATT, *Vice-President.*

Attest:
[SEAL.] JOHN W. WOOTEN, *Attorney.*

STATE OF NEW YORK, *County of New York,* } ss:

On this 4th day of June, 1898, before me personally appeared Josephine H. Throckmorton, to me known and known to me to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that she executed the same.

[SEAL.] AUGUSTUS LEE, JR.,
Notary Public, County of New York.

Approved by—
R. H. ALVEY,
Chief Justice.

159 COUNTY AND STATE OF NEW YORK, ss:

On the fourth day of June, in the year 1898, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation named in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and the said Henry B. Platt further said that he was acquainted with John W. Wooten and knew him to be the attorney of said company; that the signa-

ture of the said John W. Wooten subscribed to the said instrument was in the genuine handwriting of the said John W. Wooten, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Henry B. Platt.

[SEAL.] AUGUSTUS LEE, JR.,
Notary Public, New York County.

STATE OF NEW YORK, *County of New York*, } ss:

I, William Sohmer, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Augustus Lee, Jr., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written was at the time of taking such proof or acknowledgment a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn, and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 4 day of June, 1898.

[SEAL.] WM. SOHMER, *Clerk.*

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company, in the city of Baltimore, State of Maryland, on the 5th day of May, 1897, at which was present a quorum of said directors, duly authorized to act in the premises, on motion, it was unanimously—

"Resolved, That in pursuance of section eight hundred and eleven (811) of the Code of Civil Procedure of the State of New York, Henry B. Platt, vice-president, or John W. Wooten, attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt, and Cyrus S. Sedgwick, attorneys-in-fact of this company in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said John W. Wooten, attorney of the company, or by either one of the other persons above named, as occasion may require."

COUNTY AND STATE OF NEW YORK, ss:

I, John W. Wooten, attorney of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of the said original resolution.

Given under my hand and seal of the company, at the city of New York, this fourth day of June, 1898.

[SEAL.] JOHN W. WOOTEN, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1897.

Resources.		Liabilities.	
Real estate	$600,000 00	Capital stock	$1,000,000 00
Stocks and bonds	1,610,800 00	Surplus	1,000,000 00
Premiums due by agents, less commission	101,136 77	Reserve	435,089 02
Cash in bank, etc.	188,587 56	Claims in process of adjustment	7,829 78
		Claims reported: proof not filed	20,507 71
		Undivided profits	37,097 15
	$2,500,524 33		$2,500,524 33

COUNTY AND STATE OF NEW YORK, *ss:*

John W. Wooten, being duly sworn, says that he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company as of December 31st, 1897, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 4th day of June, 1898.

[SEAL.] AUGUSTUS LEE, JR.,
Notary Public, New York County.

[Endorsed:] No. 712. Josephine H. Throckmorton and Luke Devlin *vs.* Washington D. Holt, William G. Sterett, and others. Bond on writ of error to Sup. Ct. U. S. Court of Appeals, District of Columbia. Filed Jun- 7, 1898. Robert Willett, clerk.

160 UNITED STATES OF AMERICA, *ss:*

To Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Josephine H. Throckmorton and Luke Devlin are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this seventh day of

June, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted June 7, 1898.
A. S. WORTHINGTON,
J. M. WILSON,
Att'ys for Def'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-7, 1898. Robert Willett, clerk.

161 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 160, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Josephine H. Throckmorton and Luke Devlin, appellants, *vs.* Washington D. Holt, William G. Sterett, Margaret Bowmer, John W. Holt, Lockie W. Iglehart, Sarah Holt, by John W. Holt, her guardian; Robert S. Holt, Thomas Holt, and James Holt, No. 712, April term, 1898, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of June, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

162 In the Supreme Court of the United States, October Term, 1899.

JOSEPHINE HOLT THROCKMORTON ET AL., Plaintiffs in Error,
vs.
WASHINGTON HOLT ET AL., Defendants in Error.
} No. 103.

Stipulation.

Counsel for plaintiffs in error and defendants in error stipulate as follows:

That there has been inadvertently omitted from the record and should appear therein on page forty-seven, after the will of Joseph Holt, dated April 9, 1848, that said will when given in evidence at the trial was enclosed in a paper wrapper, which was also given in evidence and which bore the following endorsement:

"Will of J. Holt. This will has been wholly revoked. J. Holt,"

the said endorsement being in the handwriting of said Joseph Holt.

It is also agreed that this stipulation be annexed to and printed with the record in this cause and constitute a part thereof.

J. J. DARLINGTON,
WM. G. JOHNSON,
Counsel for Plaintiffs in Error.
A. S. WORTHINGTON,
J. M. WILSON,
Counsel Counsel *for Defendants in Error.*

163 [Endorsed:] File No., 16,930. Supreme Court U. S., October term, 1899. Term No., 103. Josephine H. Throckmorton *et al.*, P. E., *vs.* Washington D. Holt *et al.* Stipulation to correct record. Filed October 13, 1899.

Endorsed on cover: Case No. 16,930. District of Columbia Court of Appeals. Term No., 103. Josephine H. Throckmorton and Luke Devlin, plaintiffs in error, *vs.* Washington D. Holt, William G. Sterett, Margaret Bowmer, *et al.* Filed July 11th, 1898.

Office ... Court U. S.
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JAN 25 1900
JAMES H. McKENNEY

No. 103 21

Off. of Darlington.

& Fraser for P. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

No. 103.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

J. J. DARLINGTON,
CALDERON CARLISLE,
WILLIAM G. JOHNSON,
GEORGE C. FRASER,
Counsel for Plaintiffs in Error.

LAW REPORTER PRINT.

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In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 103.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

This case is brought here by writ of error to the Court of Appeals of the District of Columbia (Rec., p. 162) to review the judgment of that court (Rec., p. 162) affirming the final judgment of the Supreme Court of the District of Columbia (Rec., p. 14), denying probate to a paper writing dated February 7, 1873, purporting to be the last will and testament of Joseph Holt, deceased (Rec., pp. 20, 148).

THE QUESTIONS IN THIS CASE.

The main questions of law raised by the Record in this case have never before been presented to this court.

The gravity and importance of the questions and the far reaching consequence in will contests of this court's decision thereon, seem not only to justify but to require of counsel

the most exhaustive research of precedents and the fullest presentation in argument. The consequent length of this brief suggests to counsel the propriety of stating, at the outset, the principal questions of law presented. They may be stated thus:

1. Is evidence of a revocatory *animus* admissible to prove revocation in the total absence of evidence of any revocatory *act* by the testator?

2. Is evidence of the declarations or acts of the decedent wholly disconnected with the alleged act of execution and having no relation to the paper in controversy, admissible to disprove the physical act of execution?

It is freely admitted that the acts and declarations of a testator tending to show his state of mind, his motives, feelings or intentions are admissible on issues involving either testamentary capacity or undue influence.

It is also admitted that such acts and declarations are admissible upon an issue of revocation either to support or rebut a presumption of law arising from any act revocatory in character done or authorized by a testator.

But it is denied that such evidence is admissible on an issue of revocation in the entire absence of any evidence, of any act, revocatory in character, done or authorized by the testator.

It is also denied that such evidence, wholly disconnected with the fact of execution and having no relation to or connection with the paper, is admissible either to prove or disprove the physical act of execution.

There are subsidiary questions in themselves very important, but the foregoing are the main questions presented by the Record.

The Proceedings Below.

Joseph Holt died in Washington, August 1, 1894, leaving

an estate consisting of real estate valued at about $40,000 and personal property valued at about $140,000, all of which purports to be disposed of by the will in controversy (Rec., pp. 1, 49). This proceeding concerns only the personal estate.

On August 17, 1894, a petition for letters of administration was filed by some of his next of kin, and eventually, on September 28, 1894, letters of administration were issued to The National Safe Deposit, Savings & Trust Company of the District of Columbia (Rec., pp. 1, 5). Before the administration was completed, and on August 26, 1895, the Register of Wills of the District of Columbia received through the mail an envelope addressed to him, containing a paper purporting to be the will of said Holt (Rec., pp. 20, 21, 148). On September 20, 1895, Luke Devlin, one of the plaintiffs in error who was named as executor by that paper, filed his petition for probate of the same and the issuance of letters testamentary to him (Rec., p. 4). On October 14, 1895, the next of kin of said Holt filed a caveat, to which the said Devlin and the two legatees under the will filed their answer December 2, 1895, (Rec., p. 9). On March 20, 1896, the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, transmitted to a special term of said court, sitting as a circuit court, for trial by a jury, certain issues, viz: Forgery, fraud, undue influence and revocation (Rec., p. 12). These issues were tried before the court and jury, the trial lasting from May 18, to June 25, 1896 (Rec., pp. 20, 13) and resulting in a verdict against the will on the issue of forgery (Rec., p. 13) upon which the court, at a special term for Orphans' Court business on July 10, 1896, entered a final judgment, denying probate to the paper (Rec., p. 14). From this judgment, the caveatees, on the same day, appealed, and, on June 30, 1897, *nunc pro tunc*, the bill of exceptions was duly signed and sealed, and the record was transmitted to the Court of Appeals, July 29, 1897 (Rec., pp. 142, 143). In

the meanwhile, on August 3, 1896, one of the caveatees, Elizabeth Hynes, withdrew her appeal (Rec., p. 16). As by the will the whole estate is equally divided between Miss Hynes and Miss Thockmorton, one of the plaintiffs in error, Miss Hynes' withdrawal reduced the amount involved in the subsequent proceedings by one-half, or to about $70,000. On April 6 and 7, 1898, the cause was argued before the Court of Appeals (Rec., p. 145), which court, on May 3, following, affirmed the judgment of the court below (Rec., p. 162), and finally, on May 13, 1898, the writ of error bringing the record to this court for review was sued out (Rec., p. 162).

STATEMENT.

By the rulings of the trial justice, made over objection and exception of the plaintiffs in error, who were caveatees below, a mass of testimony, covering practically the whole life of the decedent, was admitted in evidence.

Judge Holt's Life and Family.

Laying aside for the present all question as to the admissibility of any of this evidence, it appears therefrom that Joseph Holt was born in Kentucky in the year 1807, and resided there, with the exception of a short period when he lived, in Mississippi, until 1856. During that year he came to Washington as a member of President Buchanan's cabinet, and from that time resided here until his death, at the advanced age of eighty-seven years, on the first of August, 1894 (Rec., pp. 49, 108). In 1862 he became Judge Advocate General of the Army and Chief of the Bureau of Military Justice, holding this office until his final retirement from official life in or about September, 1875 (Rec., pp. 22, 43).

He was twice married, first in 1837 to Miss Mary L. Harrison, who died in 1846. Four years later, in 1850, he

married Miss Margaret Wickliffe, and was again left a widower in 1860, no children having been born to him by either marriage (Rec., pp. 49). The remaining thirty-four years of his life he spent alone, unattended by any relative, his household consisting merely of his domestic servants (Rec., p. 80).

His father died prior to 1861 and his mother in 1871. He had one sister and three brothers. The sister, Elizabeth Sterett, died in 1863, leaving two children, William G. Sterett and Margaret T. Bowmer. His brother James died in 1867 childless. His brother, Robert S., also died in 1867, leaving nine children, six of whom, Lockie W. Iglehart, Sarah Holt, Robert S. Holt, John W. Holt, James Holt and Thomas Holt survived Judge Holt. His brother Thomas died in 1876, leaving one child, Washington D. Holt (Rec., p. 49).

These several nieces and nephews were the caveators in the court below and are the defendants in error here. In 1873, the year of the will, these same persons were his only next of kin, with the exception of Washington D. Holt, whose father, as above stated, did not die until three years later, and two children of Robert S., who died after that time and prior to 1894 (Rec., p. 60).

When the civil war broke upon the country Joseph Holt espoused the Union cause with both zeal and bitterness, while his relatives allied themselves with the Confederacy, several of them being in the Confederate army (Rec., pp. 49, 60).

The Persons Named in the Will.

Though as already stated, neither of Judge Holt's marriages was blessed with children, his union with Miss Harrison brought into his life and household and committed to his charge a child, a little girl, then but five years old, the caveatee Elizabeth, or Lizzie Hynes, one of the beneficiaries named in the will in controversy.

Left an orphan in infancy this child was committed to

the care of her uncle, Dr. Harrison, the father of the first Mrs. Holt, who was also the guardian of Lizzie Hynes and in some way had lost all her property (Rec., p. 94). She was and had been from her infancy under the especial charge of Miss Harrison, to whom at the time of their marriage Judge Holt promised to care for the child, solemnly repeating this promise to his wife as she lay on her death bed (Rec., p. 94). He called her his "little girl," sent her to school, paid all her expenses, and indeed from the time of his marriage in 1837 till his death entirely supported her (Rec., p. 90). After his first wife's death he used often to visit her and have her visit him, and later when he lived in Washington, she, continuing to reside in Kentucky where her home still is, frequently accompanied him on pleasure trips and sometimes visited him at his home. In the spring of 1884 he gave her ten thousand dollars in six per cent. bonds, explaining that he sometimes forgot to send her money when she needed it, but that she was not to depend exclusively upon the income therefrom, and that she was to write to him whenever she wished more. This she did, and he continued to remit money to her, faithfully fulfilling to its letter and in a spirit of generosity and affection the promise to his deceased wife (Rec., pp. 91, 94).

In the summer of 1884 he said to her:

> "I want to talk with you; I have never talked to you seriously about this matter, but I want you to remember you are amply provided for besides the $10,000 I have given you" (Rec., p. 91).

On February 24, 1885, he wrote her addressing her as "My precious cousin," and stating among other things:

> "You can not rejoice in your independence more than I do—I trust that it will be hereafter in my power to make you yet more so. I should be very wretched, indeed, if I thought you would ever be left to the tender mercies of the world, which, in its selfishness, turns its back on the helpless, but is pro-

> fuse in its offer of assistance to those who do not need it. Have no fear—you are safe now, but will be safer in due time" (Rec., p. 91).

In 1858 Judge Holt made the acquaintance of Major Charles B. Throckmorton, who was then a boy sixteen years of age. The following year Judge Holt, then being Postmaster General, appointed Throckmorton to a clerkship under him in his department, and later, when the civil war broke out, used his influence to procure that young man a second lieutenancy in the Union army (Rec., p. 108).

The Throckmorton family sympathized with the South, Throckmorton's father having entered the Confederate army, and it was due to Judge Holt's influence that this young man espoused the Union cause; thus furnishing an example, not unusual during that conflict, of father and son serving in the opposing armies (Rec., p. 108).

During the war Judge Holt kept up a correspondence with the young officer, and their relations were most friendly (Rec., p. 108). The high esteem in which he held him is strikingly shown by the many expression of confidence and affection contained in Judge Holt's letters written him at that time (Rec., p. 114). Thus, on October 4, 1861, Judge Holt writes:

> "I was gratified beyond measure at the mention of your gallant bearing on the field of Bull Run, which is found in the report of your commanding officer. You have only realized my anticipations; but I was delighted that you should so early have had an opportunity of vindicating the confidence reposed in you by your country."

And again, July 16, 1863:

> "All that I have heard of you has fulfilled my early expectations & has been to me a source of the highest gratification. As you have begun, so I am sure you will continue to the end—earnest, outspoken and heroic in your loyalty, & in your love

> of a country and Government, every throb of life has teemed with blessings & honors for the American people."

And on August 5 of the same year:

> "Your record is without a stain, & my conviction is complete that it will grow brighter & brighter with the years that are to come."

Further evidence of his estimate of Major Throckmorton is found in the letter of December 9, 1876, written by Judge Holt to President Grant, highly commending Major Throckmorton's military services and recommending him for appointment as major, in which letter, speaking of Major Throckmorton, he says:

> "He entered the army in March, 1861 & though then but a youth he remained faithful to the flag, in despite of the remonstrances & importunities of his father, who sought to carry him with himself into the military service of the rebellion" (Rec., p. 111).

On February 7, 1873, the day that the will bears date, and on September 29, 1873, in letters to Major Throckmorton's wife (Rec., pp. 112–113) will be found further expressions of his appreciation of and regard for Major Throckmorton, while he concludes a letter to Major Throckmorton's wife, dated January 12, 1880 (which was intended 1881), (Rec., p. 108), with the following words:

> "I beg you will express my warmest thanks to the Major, for his very kind & most welcome letter. He has been my constant, true friend through many long & weary years. His friendship, always heartily reciprocated—has cheered & blessed me, & I am & shall always be most grateful for it, as I am for your own words now before me" (Rec., p. 109).

In 1863 Major Throckmorton married Miss Fannie Wickliffe, the cousin of Judge Holt's second wife, having been

previously strongly commended to the Wickliffe family by Judge Holt (Rec., p. 108).

In 1866 there was born to Major and Mrs. Throckmorton their first child, a daughter, who was named Josephine Holt Throckmorton, for Judge Holt (Rec., p. 108). She is the other beneficiary named in the will in controversy and one of the caveatees in the court below and plaintiffs in error here.

Judge Holt wrote to Major Throckmorton acknowledging the compliment in naming his first child for him, saying:

> "I am in receipt of your kind note of the 8th inst. advising me of the birth of a little daughter in your home, & that you have honored me so far as to give her my name. I accept this as a great compliment from cousin Fannie & yourself, & as a recognition of one (*sic*) friendly relations which has deeply touched my heart & for which I am most grateful" (Rec., p. 114).

He consented to act as godfather for the little one, sending a silver mug as a present, and a bottle of water for the christening which he had brought from the River Jordan (Rec., p. 108).

He developed great affection for this little girl, showed her much attention, taught her to call him "Bon Pere" and made her many presents (Rec., p. 115).

Major and Mrs. Throckmorton had one other child, a son, named Wickliffe (Rec., p. 116).

Some indication of the attitude of Judge Holt towards these children is disclosed in his letter of February 7, 1873, to Mrs. Throckmorton (Rec., p. 112), in which he says: "Give my love to the dear little children and tell them that I think of them and love them always." While in his letter of September 29, 1873 (Rec., p. 113), speaking of these children, he says:

> "If I could only hear the bright joy of those dear little children my ears would have a peace which the saints cannot provide for them here."

Major Throckmorton's mother, who, at the time of the trial was over eighty years of age and of feeble health and memory (Rec., p. 108), sustained until 1880 very friendly relations with Judge Holt. She used to visit him, he placed his carriage at her disposal, and directed his coachman to drive her whenever and wherever she desired to go (Rec., p. 83).

In 1880, in consequence of some representations she is supposed to have made to the effect that Miss Lizzie Hynes had ridiculed Judge Holt, he became angered with her and their friendly relations terminated. While this circumstance necessarily placed Major Throckmorton in a delicate position, it occasioned no ill-feeling between him and Judge Holt (Rec., p. 110), as is most clearly demonstrated by the expressions contained in Judge Holt's letter of January 12, 1881 (erroneously dated 1880), (Rec., p. 108), to Major Throckmorton's wife, after the occurrence and with reference to that very matter (Rec., p. 109).

Nor was this the only episode of the kind occasioned by woman's indiscretion. According to the evidence of the caveator, Mrs. Bowmer, her friendly relations with Judge Holt were terminated in 1879 by the false representations of Washington Holt's wife and mother that she had criticised him, and notwithstanding her efforts towards reconciliation, none was ever effected (Rec., p. 64).

During Judge Holt's incumbency of the office of Judge Advocate General from 1862 to 1876, he was in daily contact with Luke Devlin, who is named as executor in the will in controversy, the other caveatee in the court below and plaintiff in error here. Devlin was employed as a copyist and messenger and later as clerk in that office, having his desk in a room next but one to that occupied by Judge Holt. Devlin during this period frequently met Judge Holt socially at the house of Mrs. Throckmorton, Sr., occasionally called on him, and their official relations were always friendly and kindly (Rec., pp. 22, 43, 81, 85).

After Judge Holt's retirement from office Devlin met him more or less frequently until 1878, and between that time and the time of his death often called upon him and occasionally met and conversed with him elsewhere (Rec., p. 22).

Judge Holt's estimate of this man is evidenced by his letters of commendation and his letter of March 26, 1867, to Mr. Stanton, then Secretary of War, recommending Devlin for an appointment to a lieutenancy in the army (Rec., pp. 88, 89).

Judge Holt's Relatives.

The evidence as to the life of Judge Holt shows that there was little personal intercourse between him and his family. They were early separated, and with the exception of his mother he saw little of any of them until during the last decade of his unusually long life. They were scattered in their places of residence. Prior to 1856 Judge Holt resided in Louisville, Kentucky, as appears by his will of 1848 (Rec., p. 44); his father and mother lived at Holt's Bottom, in Breckenridge county (Rec., p. 50); his brother Robert lived in Mississippi (Rec., p. 49); while his brother James and his sister, Mrs. Sterett, lived in Texas (Rec., p. 68).

From 1856, when he came to Washington, until 1889 none of his relatives resided in this District. In 1889, sixteen years after the date of the will, one of these relatives, William G. Sterett, took up his residence in Washington (Rec., p. 67), and with this exception none of his relations lived near him during the last thirty-eight years of his life, but all of them resided at places more or less remote from his home (Rec., pp. 50, 54, 60, 69, 78).

There is some general testimony (Rec., pp. 49, 50) to the effect that in 1873, the year of the will in controversy, the relations between Judge Holt and his then living relatives were not unkindly. But the facts show that from the time of the civil war there had been strained relations and little

intercourse between him and these relatives. Omitting his letters to his mother, who died in 1871, his correspondence with the family of his brother Robert consisted of one letter, in 1867, to Robert (Rec., p. 50) and one to Robert's daughter (Rec., pp. 51, 52) on the occasion of some mental malady affecting the latter. His correspondence with the family of his brother Thomas was limited to one letter to Thomas' wife and one to her daughter in law, the wife of Washington Holt, and two letters to Thomas of a business character (Rec., pp. 52–54). The only correspondence with the children of his deceased sister was a single letter to Mrs. Bowmer (Rec., p. 53). Between the breaking out of the civil war and the death of his mother in 1871, a period of ten years, he visited his mother's family at the old homestead but once, in 1870, at which time the caveator, Margaret T. Bowmer, testifies that "there were cold and strained relations between him and said family" (Rec., p. 64). He did not at that time, nor for many years afterward, visit either of the children of his deceased sister, and one of them, William G. Sterett, testifies that he did not know that Joseph Holt knew whether he, Sterett, was living or not in 1873, and that there was no intercourse between them of any kind between 1864 and 1878, a period of fourteen years (Rec., p. 68), while Mrs. Bowmer testifies that after the first year of the war Judge Holt never visited her father's house (Rec., p. 64). His relations at that time with his remaining relatives, namely the children of his deceased brother Robert, is best shown by the testimony of Robert S. Holt, Jr., one of the caveators, who says that Judge Holt had become very much embittered toward the South and Southern people, this bitterness extending to some of his, Judge Holt's, family, though, as the witness claimed, it did not extend to his own father and the latter's immediate family. Still he says that prior to 1883 there was no communication of any kind between Judge Holt and the witness, the witness—

"feeling that, if Joseph Holt had permitted the

> bitterness engendered by the war to render him indifferent toward witness, the first advances toward reconciliation must come from him" (Rec., p. 60).

He also says that, though he had not felt unkindly toward Judge Holt, he had been—

> "somewhat resentful that the latter had permitted the bitterness growing out of the war to so affect his relations to his family that he had apparently manifested no interest in the family of his brother, consisting of nine children, the eldest of whom was a student at college at the time of their father's death";

and that there had been, not merely an absence of aid or assistance, which was not necessary, but of such "interest, sympathy, and friendship as might be manifested in other ways" (Rec., p. 61).

Notwithstanding the fact that, for a short while prior to 1856, Judge Holt lived in Mississippi, where his brother Robert resided, it does not appear that he ever saw any of Robert's children until after the war. In 1868 he saw Sarah Holt for the first and only time, at an asylum in Philadelphia (Rec., p. 51). Mrs. Iglehart, who was born in 1850, he never saw until 1874, when she visited Washington on her wedding trip (Rec., p. 54). Robert S. Holt, who was born in 1855, he met in 1875 or 1876 for the first and only time when he visited Robert Holt's mother in Evansville, Indiana, to which place she had removed from Mississippi in 1868 (Rec., p. 60), while Thomas H. Holt, who was born in 1858, after Judge Holt came to Washington, he did not see until the later years of his life (Rec., p. 50). Some time after the war and before February, 1873, he saw Joseph while the latter, with his mother, was for a few days in Washington. What year this was is not disclosed in the evidence (Rec., p. 49).

Some time after 1873 cordial relations between Judge Holt and some of his relatives began to be established, as is shown by the correspondence in the Record. The general tendency of this evidence is to show an increasing kindliness and re-

gard for Washington Holt and his family—particularly his wife (Mrs. Vanda Holt), who was not a relative of Judge Holt. To Washington Holt's wife and daughter he appears to have been in later years, not only liberal, but munificent, in his gifts (Rec., pp. 69, 74, 75, 78), to such an extent that a bequest of the residue of his property to strangers to his blood could not be regarded by them as unreasonable or unkind, except under the stimulus of extreme selfishness or cupidity.

Judge Holt's Home Surroundings at the Time of His Death.

As before stated, for the last thirty-four years of his life Judge Holt's household consisted only of himself and servants, upon whom he became more and more dependent as his life drew near its close. For several years prior to his death he suffered from a progressive disease of the eyes, culminating in almost total blindness; and during this time he was accustomed to employ his servant Strothers to write letters for him at his dictation (Rec., pp. 79, 87).

During all these years of loneliness he seems not to have desired the companionship in his home of any of his next of kin; and while there is evidence tending to show that some of them visited him more or less frequently in the later years of his life, none of them ever became an inmate of his home to cheer by his or her presence and sympathy his declining years.

From 1889 until 1894, the five years immediately preceding his death and covering the period of his affliction resulting in the loss of his sight, only one of his relatives lived in Washington, that one being the caveator, William G. Sterett (Rec., p. 67). During the winter of 1893, however, Mary Holt, the daughter of Washington Holt, spent several months in Washington, living, not with her uncle, Judge Holt, but at a boarding house (Rec., p. 69).

In July, 1894, Judge Holt had a fall on the staircase in

his house resulting in injuries which confined him to his bed (Rec., p. 80).

None of his relatives called to see him during this time or to offer any assistance or sympathy in his affliction, and about a week later, on August 1, 1894, at the advanced age of 87 years, Judge Holt died in his house alone, with only his colored servants to minister to him in his last hours (Rec., pp 1, 49, 80).

Immediate Possession of Judge Holt's House and Effects Taken by Cavcators.

Immediately after Judge Holt's death, however, William G. Sterett, and his wife, went to Judge Holt's house, and took possession of the same, they and the servants being the only occupants until the next day, when Washington, D. Holt and his wife arrived, and the keys of Judge Holt's desk and closet where his private papers were kept were by the servants delivered to Washington D. Holt (Rec., p. 80).

It is established by the evidence offered by the caveators that Judge Holt was most particular and methodical in the keeping of papers. His papers were arranged and endorsed in such good order that after his sight failed him he could direct his servants where to find any paper he desired to consult. According to the testimony of the caveators, not only business papers, but old private letters, newspapers, and even advertising circulars were preserved by him. He destroyed nothing. He even rebuked the servant, Charles Strothers, on one occasion for having burned a spoiled bank check, telling him to burn nothing (Rec., pp. 80, 81, 87).

His will of 1848 (Rec., pp. 44–47) was not burned, torn or in any wise mutilated, but was preserved by him in its original condition and integrity to the day of his death, forty-six years after its execution; and though, by reason of the changes wrought by time, scarcely any provision in it was capable of being carried out at the time of his death,

it remains, as when executed, unaffected by any act of his, save the endorsement on the wrapper enclosing it (Rec., p. 167).

Unlawful Disturbance and Destruction of Judge Holt's Papers by Caveators.

After Washington Holt got possession of the decedent's keys from the servants, he and Sterett proceeded to make search among his papers for a will. In doing this they created much confusion and disorder among the papers, scattering them about (Rec., p. 48). They and the servant Strothers, by their direction, burned a quantity of papers belonging to the deceased—some in a coal-scuttle in the yard and others on the hearth in Judge Holt's bedroom (Rec., pp. 80, 81, 87).

That the quantity of papers burned in this way must have been considerable appears from the fact that Strothers, a witness for the caveators, states " that they were burned *one chilly day to make a fire* and *the fire was kept up with them*" (Rec., p. 87). Washington Holt and Sterett did not confine their search to the papers in Judge Holt's house, but also had access to and examined those in his safe deposit box, and they claim that no will, except the one of 1848, was found in any place (Rec., p. 80).

After the search among and the burning of the papers above described, and some two weeks or more after the death of Judge Holt, the Register of Wills and his assistant were invited by Washington Holt and Sterett to come to the house and make another search for a will among the papers already examined by them (Rec., p. 48).

The object of this second and quasi-official search is not explained by the testimony, but that they knew it must be fruitless is evidenced by the fact that Washington Holt offered to the Register of Wills a reward of forty thousand dollars and to his assistant one of five thousand dollars, if

they should find a will. The search was, of course, without result (Rec., p. 48).

It was by the testimony of this assistant to the Register of Wills that the fact was first brought to light that papers of the deceased had been burned, that official testifying that he "saw in a grate that a considerable number of papers had been burned;" that he—

> "suggested sealing up the papers, because he saw how things were going on there, and he thought it best to do so until somebody in authority took charge" (Rec., p. 48).

Spoliators, the Sole Source of Information as to Papers Burned, Continue in Control.

While it is an established and undisputed fact that this burning of the decedent's papers was done by Washington Holt and Sterett, or Strothers, acting under their orders, yet as to what the papers were which were so destroyed, and why they were burned, the court is dependent wholly upon the testimony of the parties engaged in their destruction. Reference to that testimony will be made hereafter; but at this point it suffices to say that before administration granted, and without lawful right and without opportunity for inspection by others, papers belonging to the deceased were destroyed by burning by two of the caveators, who would be interested in the destruction of the will in controversy, or by Strothers, under their direction.

It is a noticeable fact that the caveators, who, from the moment Judge Holt breathed his last, have been in absolute control of all his papers and effects, do not produce a single letter addressed to Judge Holt by any of themselves; and in this connection it is most important to note that among the papers burned were, according to their testimony, a number of letters from Washington Holt and his family (Rec., p. 80).

Shortly after the death of Judge Holt this same man

Strothers, who appears as a witness for the caveators, was, by them, put in charge of the residence of Judge Holt, and together with his wife and mother occupied it, rent free, down to and during the time of the trial. He was permitted to conduct a wood and coal business on a portion of the premises, which he lettered with signs relating to that business, and was also permitted to rent out part of the property for his own benefit (Rec., p. 87).

The testimony of an expert in handwriting, which is not contradicted, is to the effect that the writing on the envelope in which the will in controvery was sent to the Register of Wills, was done by this same man Strothers, who assisted Washington Holt and Sterett in the burning of Judge Holt's papers (Rec., pp. 99, 100).

Washington D. Holt, William G. Sterett and John W. Holt, in their petition for letters of administration, allege that "after careful and diligent search and inquiry in respect of a will," they are advised that said Joseph Holt died intestate, and pray that they, the petitioners, be appointed administrators (Rec., pp. 1–3). Letters of administration, however, were granted, not to the petitioners, but to the National Safe Deposit, Savings and Trust Company of the District of Columbia, which proceeded with the administration of the estate (Rec., p. 4).

The Will Anonymously Sent by Mail to the Register.

Before the administration was completed, and about two months before the time for distribution of the estate, on the 26th of August, 1895, there was delivered to the Register of Wills, in the ordinary course of mail, an envelope addressed "To the register of wills, Washington, D. C.," which, upon being opened by that officer was found to contain a paper purporting to be the last will and testament of Joseph Holt, the paper in controversy in this case (Rec., p. 21).

The envelope was mailed on Saturday, the 24th of August, 1895, by being deposited in one of the U. S. mail boxes in

the northwest section of this city, being that portion bounded by North Capitol Street, the Mall and Georgetown, some time between the hours of three and four P. M. (Rec., pp. 119, 120). By reason of Sunday intervening it did not reach the Register of Wills till Monday morning. At the time of its mailing Miss Hynes was in Kentucky, Luke Devlin was residing in Washington and Miss Throckmorton and her family in New York. Miss Throckmorton in her testimony in rebuttal, upon her direct examination testifies that she had been on a visit in Virginia and passed through Washington on the 24th of August, 1895, on her way home and was at the Baltimore and Potomac Railroad station for about an hour that afternoon, awaiting train connection for New York, leaving about three o'clock (Rec., p. 116).

No letter or communication of any kind was enclosed with the will and the address on the envelope is apparently in unnatural and disguised writing. The paper in controversy purports to be written and signed by Joseph Holt, and to be attested by General U. S. Grant, then President of the United States, General William T. Sherman, then General of the Army, and his wife, Mrs. Ellen B. E. Sherman. It bears date February 7, 1873, and divides the entire estate between Elizabeth Hynes and Josephine Holt Throckmorton and appoints Luke Devlin executor (Rec., pp. 20, 21, 148).

When received by the Register of Wills, the paper in controversy was in the condition in which it now is, burned and torn in places, but entirely legible, and the seal, if there ever was one, gone (Rec., p. 21).

Subscribing Witnesses all Assembled at Judge Holt's House in the Month and Year the Will Bears Date.

In February, 1873, the month and year that the will in controversy bears date, all the persons whose names appear as witnesses to that paper were assembled in Judge Holt's house.

During that month he gave a dinner party to *ten* persons,

having for his guests the President and Mrs. Grant, General and Mrs. Sherman, the Secretary of State and Mrs. Fish, Mrs. Ricketts and three other persons (Rec., p. 87).

In a letter written by Judge Holt to Major Throckmorton's mother (Rec., p. 117) he expresses concern lest General and Mrs. Sherman should not be present because General Sherman's regular weekly reception occurred the same evening and seeks Mrs. Throckmorton's aid to secure their presence at the dinner.

From that letter it appears that Mrs. Throckmorton was one of the guests at that dinner, because in it Judge Holt suggests:

> "As the weather will prevent you from seeing Mrs. S., could you not address her a note this evening urging her to *meet you* at the dinner?" (Rec., p. 117).

The exact date of this dinner could not be ascertained. From his account of expenses Judge Holt appears to have given a dinner on the 21st of February, 1873, (Rec., pp. 117, 118), but this was unquestionably a different occasion as it was for *seventeen* persons (Rec., p. 118).

Proceedings for Probate of Will.

On the 20th of September, 1895, the petition of Luke Devlin, for the probate of this paper was filed; the caveators appeared and filed a caveat which was answered by the executor and beneficiaries under the paper and issues were framed thereon and directed to be tried by a jury (Rec., pp. 4, 12). At the trial two of the issues were abandoned by the caveators, and evidence was only offered upon the remaining two, raising the questions of forgery and revocation (Rec., p. 127). The subscribing witnesses to the paper, General Grant, General Sherman, and Mrs. Sherman had all died before Judge Holt, and the caveatees, in making out their case in chief upon the issue of forgery offered testimony tending to prove the genuineness of the signatures of the witnesses; General Grant's signature being proved by

his son, Frederick D. Grant; General Sherman's by his brother, Senator John Sherman, and Mrs. Sherman's by her son, P. Tecumseh Sherman (Rec., pp. 20, 21).

They also offered testimony tending to show that the body of the will and signature of Joseph Holt were in his handwriting; the testimony in this behalf being that of a number of persons intimately acquainted with Judge Holt and having special familiarity with his handwriting (Rec., pp. 23, 25). Among these witnesses who testified to the genuineness of the will was the Hon. Robert R. Hitt, of Illinois, who, upon cross-examination was asked if the phraseology of the paper exhibited Judge Holt's characteristics of composition (Rec., p. 26). This was objected to by the caveatees, and after very full argument by counsel the court sustained the objection, holding testimony of that character to be clearly incompetent (Rec., pp. 23–28). The caveatees also offered the testimony of the two beneficiaries and the executor named in the will, to the effect that none of them had been in possession of or seen the paper until after its receipt by the Register of Wills (Rec., p. 22), and then rested their case (Rec., p. 28).

It is important to observe here and bear in mind throughout the consideration of this case that the evidence offered by the caveatees in their case in chief was confined exclusively to the proof of handwriting and to the denial on the part of all the persons interested under the paper that they had any knowledge of its existence until after its receipt by the Register of Wills. When the defendants in error proceeded to offer their testimony, they did not confine themselves to evidence as to handwriting, but claimed the right to offer in evidence testimony as to the alleged conduct and declarations of Joseph Holt, as to his relations with his next of kin, his intentions as to the disposition of his estate, and his feelings towards persons more or less remotely connected with the parties named in the will in controversy.

All this class of evidence was objected to by the caveatees

as inadmissible upon either the issue of revocation or that of forgery, but was admitted by the court upon both these issues, to which the caveatees excepted. These exceptions, and those taken to the instructions to the jury and the charge of the court, constitute the errors assigned as ground for reversal by this court of the judgment of the court below.

ASSIGNMENT OF ERRORS.

1. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony as to alleged acts and declarations of Joseph Holt, indicating his personal relations with certain of his next of kin and certain persons nearly or remotely connected by consanguinity or affinity with the persons named as beneficiaries in the will in controversy, as set forth in exceptions Nos. 4, 5, 10, 11, 12, 13, 15, 16 and 17 (Rec., pp. 34–35, 35–36, 49–50, 60–67, 68–78, 82–83, 83–84).

2. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony as to alleged declarations of said Joseph Holt as to actual or intended dispositions by will of some of his property, as set forth in exceptions Nos. 2, 6 and 14 (Rec., pp. 28–29, 36–39, 78–79).

3. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony tending to show the existence in 1886 of hostile feelings by said Joseph Holt towards the husband of a niece of one of the beneficiaries under the will as set forth in exception No. 20 (Rec., pp. 94–95).

4. The court erred in instructing the jury upon the issue of revocation as prayed by the caveators in their prayers numbered 4 and 7, set forth in exceptions Nos. 25 and 26 (Rec., p. 120).

5. The court erred in refusing to instruct the jury upon

the issue of revocation as requested by the caveatees in their prayers numbered 3, 5, 6, 12 and 13, set forth in exceptions Nos. 31, 32, 33, 34 and 35 (Rec., pp. 122, 123).

6. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to declarations alleged to have been made by said Joseph Holt, many years after the date of the will in controversy, as to actual or intended dispositions of his estate inconsistent with the will in controversy as set forth in exceptions Nos. 2, 6 and 14 (Rec., pp. 28–29, 36–39, 78–79).

7. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations of said Joseph Holt, occurring many years after the date of the will in controversy, as to his then existing relations with and feelings towards certain of his relatives not named in said will, as set forth in exceptions Nos. 10, 11, 12, and 13, (Rec., pp. 49–50, 60–67, 67–68, 68–78).

8. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations of said Joseph Holt tending to show the existence in his mind, many years after the date of said will, of hostile feelings towards persons nearly or remotely connected by consanguinity or affinity with persons named as beneficiaries in said will, as set forth in exceptions Nos. 4, 5, 15, 16, and 17 (Rec., pp. 34–35, 35–36, 82–83, 83–84).

9. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, the opinions of witnesses, that the said will was a forgery because of its grammatical and rhetorical style of composition, as set forth in exceptions Nos. 7, 8, and 9 (Rec., pp. 40–42, 43, 44).

10. The court erred in admitting in evidence as competent to prove that the will in controversy and the signatures of the witnesses thereto were forged, testimony as to the

characteristics of said Joseph Holt with reference to his treatment of his superior officers, such as General Sherman and President Grant, as bearing upon the probability of his having asked such persons to witness his will, as set forth in exception No. 3 (Rec., pp. 30–31).

11. The court erred in instructing the jury upon the issue of forgery as set forth in exceptions Nos. 36, 37 and 38 (Rec., pp. 131, 141–142).

12. The court erred in excluding in rebuttal the opinion of John A. Bingham, based upon his knowledge of the grammatical and rhetorical style of composition and handwriting of said Joseph Holt, that the will in controversy was genuine, as set forth in exception No. 22 (Rec., pp. 104–108).

13. The court erred in excluding the rebuttal testimony of P. Tecumseh Sherman that certain features in the signature of General Sherman to the will in controversy, which a witness for caveators regarded as evidence of forgery, were, in fact, of frequent or habitual occurrence in the genuine signature of General Sherman, as set forth in exception No. 21 (Rec., pp. 101–104).

14. The court erred in admitting in evidence in surrebuttal the testimony, offered by the caveators, of Martha Scott, as set forth in exception No. 24 (Rec., pp. 118–119).

ARGUMENT.

Before entering upon the discussion of the questions of law raised by the assignment of errors, it seems proper briefly to explain the course of proceedings from which the judgment in this cause results.

The Law and Practice of this Jurisdiction in Will Contests.

By the law and practice in the District of Columbia when a contest is made as to the validity of any last will and tes-

tament propounded for probate, the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, has the power and jurisdiction to hear and decide all matters touching the validity of such paper as a testamentary disposition of personal estate. By that law and practice, however, if at any time before judgment rendered in a contest, any party interested therein should demand a jury trial it is the duty of the court to frame an issue or issues presenting the material questions of fact in controversy between the parties, to be tried by a jury.

The practice in vogue under the act of Assembly of Maryland of 1798, Chapter 101, ever since its enactment, both in Maryland and this District, has been to frame those issues in the form of an interrogatory which the jury by its verdict could answer simply "yes" or "no" and that practice was observed in this case.

The issues presented were four in number. The second and third presented the questions of fraud and undue influence in procuring the execution of the paper, upon which issues no evidence was offered. They were abandoned at the trial and the court peremptorily directed the jury to answer each of them in the negative. No question was or is raised with reference to them upon this Record and they are as completely eliminated from consideration here as though they had never been transmitted for trial (Rec., p. 127).

The first and fourth issues which were tried by the jury are as follows:

> "1. Was the paper writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?"
>
> "4. If the said paper writing was executed by the said Joseph Holt as his last will and testament has the same been revoked by said testator?" (Rec., p. 12).

Each of these issues, it will be observed on its face, in-

volves an inquiry into two things, namely, a physical and a mental fact.

The first issue involves the physical fact of execution by signing the paper in dispute and the mental fact of an *animus testandi.*

The ~~second~~ fourth involves the physical fact of the doing of some revocatory act by the testator and the mental fact of an *animus revocandi.*

Thus it will be seen that there was not presented for trial the general issue of *devisavit vel non*—the broad question, will or no will—under which any and all evidence against the validity of the paper tending to show it not to be a will, was admissible, but these simple, clear-cut interrogatories. Nor did the issues relate to every testamentary act or intent of the testator, but they were specifically confined to a particular paper, stated to have been filed in the court on the 26th day of August, A. D. 1895, a photo-lithograph of which paper appears opposite page 21 of the Record.

It is an undisputed fact in the case that this paper, with the exception of the signatures of Mrs. Sherman, General Grant and General Sherman, is wholly in the handwriting of Judge Holt or wholly a forgery.

It begins in the following form:

> "In the name of God Amen
> "— J. Holt of the City of Washington D. C. being of sound mind declare this to be my last Will & Testament"—

and concludes:

> "Signed and sealed by me in the presence of these witnesses in the City of Washington, D. C.
> "Feby 7th, 1873.
> "J. HOLT."

The paper in controversy is not only testamentary in character, in that it undertakes to dispose of the entire estate, real and personal, of the testator, but it in express terms de-

clares that it is the will of the testator, and that it is executed as such.

Judge Holt, the alleged testator, was at that time, and at all times, from his majority to the time of his death, a person of mental and legal capacity to make a will; was free from any imposition or fraud or undue influence, and if he wrote and signed the paper in controversy, he is in law conclusively presumed to have executed the paper "as his last will and testament," and these words, therefore, in the first issue, are conclusively answered by the paper itself, and no evidence to the contrary is admissible, unless at the actual time of its execution, and, as a part of the act of execution itself, the testator did declare his act not to be intended according to its legal purport, of which there is no pretense in this Record.

This is a fundamental principle of the law, essential to the integrity and validity of every written instrument. If it were permissible to show by other evidence than the instrument itself, and in the absence of any claim of fraud, coercion, accident or mistake, that the party who signed it did not know its contents, or did not intend its legal effect, the value of all written instruments would be instantly destroyed, and chaos would involve the business of the world.

While this is a fundamental principle it has not escaped controversy and has therefore required and received judicial affirmance. Counsel will not presume to burden the court with the consideration of authorities upon this primary and necessary principle of the law of written instruments. But it is deemed proper, in view of the phraseology of the issue transmitted for trial and of the character of the evidence offered and admitted over objection, to invite the court's attention to a few authorities on this particular question, as applied to the trial of an issue in like form to the one in this case, touching the validity of a will.

In Munnikhuysen *vs.* Magraw, 35 Md. 280, the following issue was proposed (p. 285):

"Were the contents of said paper writing fully ex-

plained to, or known or understood, by said Emily W. Magraw before or at the time the same is alleged to have been signed by her?"

This issue was, by the Orphans' Court, directed to be transmitted for trial by a jury, and on appeal the Court of Appeals held it to be "objectionable as calculated to mislead the jury and to raise and present improper and immaterial questions" (p. 287). Bartol, C. J., saying (pp. 287–288):

> "It being conceded that the testatrix was of sound mind, capable of making a will, it follows that if the paper had been in her possession, read and examined by her before it was executed, or read to her and approved; it is wholly immaterial for the jury to inquire whether its contents and meaning had been fully explained to her, or whether she understood their meaning and effect. Such knowledge and understanding would be presumed, and imputed to her by the law, if she knew the contents of the will.
>
> . . . . . .
>
> "Sane persons when they express themselves in writing, are presumed to mean what the writing imports, and it would be dangerous and in plain violation of the Statute of Frauds, to allow it to be impeached or overthrown by evidence *aliunde*, showing that they meant something else, or did not understand its true import and operation."

In Taylor *vs.* Creswell, 45 Md. 422, Robinson, J., says (p. 431):

> "It is essential of course to the validity of every will, that the party making it should know and understand its contents, otherwise it is not his will. But where a person of *sound* mind executes a will, and the same is his *free and voluntary* act, the law presumes knowledge on his part of its contents."

In Cramer *vs.* Crumbaugh, 3 Md., 491, Le Grand, C. J. says (p. 502):

> "The inquiry then is, is the reading of the will in

> the presence of the attesting witnesses essential to the validity of its execution? We did not consider the argument of the counsel for the appellant as going thus far, but merely as insisting it should *affirmatively* appear, that he either read himself, or had read to him, the will before he affixed his signature. . . . The proof is all one way as to his mental capacity. It is not pretended he labored under any feebleness of mind not common to him, and the witnesses describe him as a man of strong common sense, of resolute will, and not easily to be shaken from his purposes. Where the capacity of the party is wholly unimpeached and an absence of proof of fraud, the law presumes a knowledge on the part of the testator of the contents of the paper which he executes. This is the rule laid down by Sir John Nicholl, in Billinghurst *vs.* Vickers, 1 Phillimore, 187 (1 Eng. Eccl. Rep. 69), and that was a case in which the executor, who was also a legatee under the will, prepared that part of the will in which he was designated as executor and legatee. There was no direct proof that the will was read to him nor that he read it himself. As observed by Sir John Nicholl, in Fawcett *vs.* Jones, 3 Phillimore, 434 (1 Eng. Eccl. Rep. 452), 'it is a general leading principle that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew its contents, and the effect of the instrument, and that he intended to give that effect to it.'"

Wharton, in his work on Evidence, says (2nd Ed., 1879. Sec. 1243):

> "And a party is assumed to have read the contents of an instrument executed by him; nor is evidence, when an instrument is offered against him, that he did not read it, admissible unless coupled with proof of fraud. To wills this inference has been frequently applied; though the inference may be rebutted by proof of facts indicating fraud, coercion or undue influence."

The importance of the foregoing rule, in its application to the present controversy, is that it eliminated from the

case all question as to the knowledge or intent of the testator, if he actually wrote and signed the paper; so that the only question which was before the jury for trial upon the first issue was as to the physical fact whether Joseph Holt wrote and signed the paper in controversy. The *animus testandi*, or other element of fact involved in the issue, was not open to trial, and no evidence in support of or against the existence of such an *animus* was admissible.

Under the fourth issue, it would be competent to show any physical act of legal revocation; but in this connection the same principle would apply. Had any written instrument been produced revoking this paper in express terms, or evidence tending to show the execution of such an instrument been offered, the *animus revocandi* would as conclusively attach to the revocatory words of such an instrument as would the *animus testandi* to the testamentary words of a will, and would have been equally closed against contradiction or qualification. No revocatory instrument was produced; not a scintilla of evidence appears in the Record tending to show the execution of any instrument containing any revocatory words, nor, in fact, the execution of any testamentary paper whatsoever, except the will in controversy and the will of 1848, found in the Record at pages 44 to 47.

The paper in controversy, however, at the time of its presentation to the court and of its submission at the trial appeared on its face to be torn and burned and so mutilated as to be revoked, if its physical condition was the result of an act or an express direction of the testator, done or given *animo revocandi.*

The fourth issue was therefore limited to the ascertainment of two facts, viz: First, whether the physical condition of the paper was the result of an act of Judge Holt or of any person by his express direction; and secondly, if so, whether such act was done or direction given with the intent to revoke.

Upon this issue evidence as to the intent of the testator

would plainly be admissible, provided there was evidence of any act of the testator to which an intent could apply. But it is submitted, that in the absence of evidence tending to show any act done by the testator, his intentions, if he had any, were utterly immaterial, and evidence as to any such supposed intention utterly incompetent and inadmissible.

It is also to be borne in mind that though this proceeding originated in the branch of the court exercising the jurisdiction formerly pertaining to the Ecclesiastical Courts, the questions here to be considered arose in a common law court in a trial by jury, and the correctness of the rulings is to be tested by the rules of evidence which govern trials of issues originating in common law courts.

It will be contended in this brief, and counsel confidently expect to make it a matter of demonstration from this Record, that the evidence in this case not only does not show that Judge Holt did, or directed to be done, any of the physical acts of defacement found upon this paper, but that the undisputed evidence in the Record conclusively and absolutely demonstrates that he did not do it, and that his only connection with this paper shown by the evidence or legally inferrable from any evidence in the entire Record, is the testimony tending to show that he wrote it.

There is another matter important for preliminary consideration.

It is to be observed that the two issues submitted for trial in this case are irreconcilably inconsistent. If the paper was a fabrication and a forgery its revocation was a physical and legal impossibility. If, on the contrary, it was legally revoked, such legal revocation would necessarily involve and establish its original genuineness, and absolutely destroy the pretension that it was a fabrication and a forgery. Evidence in support of these issues would therefore, necessarily be irreconcilably contradictory. Proof of fabrication would destroy the theory of revocation, while proof of legal

revocation would absolutely establish original genuineness and destroy the claim of fabrication and forgery.

Notwithstanding this obvious condition, all the evidence offered in this case by the caveators, except that as to handwriting, was specifically offered and admitted, over objection and exception, in support of both issues, and specifically submitted by the court to the jury in the aggregate, over objection and exception, for that purpose.

At the conclusion of the trial counsel for the caveators saw the preposterous consequence which must result if the jury believed all of their evidence, and under the instructions of the court applied it to the two issues and found a verdict in their favor upon both. They therefore requested the court to instruct the jury that if they should find in their favor upon the issue as to forgery, they should answer the issue as to revocation, "No," and add to that verdict, contrary to the practice, the reason for such finding, to wit, "Because he never executed it." In other words, they demanded that their evidence should be received and considered by the jury in support of the fourth issue, and though sufficient to sustain a verdict in their behalf upon that issue, that the jury should not render such verdict, but should render a verdict contrary to their own evidence.

It will doubtless be contended here, as it was below, that the issue of revocation having been found by the jury against the caveators, the questions relating to that issue are not open for consideration by this court.

It is submitted, however, that, notwithstanding the verdict rendered, the questions arising upon that issue are still open to consideration and important for decision.

As all the evidence was admitted upon both issues, it is material to inquire whether it was admissible upon either, because, if admissible upon neither, its admission was unquestionably reversible error, without reference to its application.

Moreover, if a new trial should be awarded this court is

called upon to determine whether the verdict upon that issue, even in the form as rendered, is not conclusive against the caveators, and if not, whether the evidence admitted could properly be received in support of the issue on such new trial

It is also to be remembered that this proceeding was prior to the act of June 8, 1898 (30 Stat. 434) conferring jurisdiction upon the court to take probate of wills of real estate and that whether a new trial of this case be granted or not, the same question must arise upon the offer of this paper as a will of real estate.

This Case, though Extraordinary in its Circumstances, is not Unprecedented, and is Subject to the Ordinary Rules of Law Applicable to Will Contests.

The circumstances attending the production of the paper in controversy in the proceedings are peculiar and unusual and to some extent mysterious, were a source of embarassment to the courts below as well as to counsel, and seem to have led the courts to the conclusion that the case was, for that reason, not within the general principles of the law applicable to other cases where the production of the will is unaccompanied by any peculiar and unusual circumstances.

It is, however, a matter of common knowledge that testamentary papers not infrequently appear in the most unexpected places. For example, testamentary papers have been found concealed in a bedstead (Castle *vs.* Torre, 2 Moore P. C., 133–160); in the lining of a trunk (State *vs.* Ames, 23 La. Ann. 69); in a barrel of waste paper (Lawyer *vs.* Smith, 8 Mich. 411); many years after testator's death in in the repositories of a deceased devisee, holding under another will of the same testator (Andrews *vs.* Motley, 12 C. B. N. S. 514); in the custody of a servant who had rescued it from a waste basket (Cheese *vs.* Lovejoy, 2 L. R. Prob. Div. [1877] 251); etc., etc.

Notwithstanding the ability and industry of the judge who tried the case and the court who heard it on appeal, and the fidelity, learning and conscientious application of

counsel on both sides who conducted the proceedings below, no case similar in its facts to the case at bar was discovered, and the courts, both at the trial and on appeal, proceeded on the theory that none such existed, and that, as stated by the trial court, the situation was unique (Rec., p. 33). Indeed, counsel for defendants in error in their brief in the Court of Appeals said:

> "This case is unique. The cases referred to in the argument on either side, and the books of precedents generally will be searched in vain for its parallel. . . . But this is the only case on record in which the disputed document has come from an unknown source, under such circumstances as plainly to indicate that he who sent it was determined that his identity should never be discovered, and in which all the subscribing witnesses were dead when the paper made its appearance, and no person appeared to testify either to the execution of the paper or to its ever having been seen from the day of its apparent date until it made its mysterious appearance."

This statement was apparently justified under the circumstances. Continued research, however, has shown that this case is not unprecedented, and resulted in the discovery of no less than four cases in which testamentary papers, sent anonymously through the mail, as was the paper in controversy, have been offered for probate and passed upon judicially.

It is a common expression that "no will case has a brother," the correctness of which is proved by the exception occurring here, for not only has the case at bar a brother, but it may be said a twin brother, in the case of—

> Hitchings *vs.* Wood, 2 Moore P. C. C. 355–448, (1841); also reported in 1 Notes of Cases in Eccl. & Marit. Cts. 144–160 (1843).

The case arose upon the propounding for probate of three written instruments, two of them together purporting to be the will, of James Wood, of the city of Gloucester, and the

third a codicil thereto. The testator died April 20, 1836, at the age of eighty years, a bachelor and without near relations, leaving personal property to the amount of about £800,000, and real estate to the value of £98,000.

An appeal to the Privy Council on a preliminary question of practice was taken and heard in June, 1838 (2 Moore P. C. C. 410), and the case remanded for hearing on the merits. The hearing on the merits took place before Sir Herbert Jenner, holding the Prerogative Court of Canterbury, in December, 1838, the argument occupying eight days and being conducted by such eminent counsel as the Queen's Advocate (Sir John Dodson), Drs. Addams, Phillimore, Haggard, Burnaby, Jenner and Curteis. Sir Herbert Jenner in February, 1839, denied probate to all three instruments, rendering an opinion covering over a hundred pages of the report. (Wood *vs.* Goodlake, 2 Curteis Eccl. Reps. 82–209; also reported in Monthly Law Magazine and Political Review, April, 1839, pp. 155–189).

An appeal was taken from this judgment to the Privy Council, and was heard by Lord Lyndhurst, Lord Langdale (Master of the Rolls), Vice-Chancellor Sir Launcelot Shadwell, Baron Parke, and Sir James Littledale, the argument occupying thirteen days in April and May, 1841. Sir John Campbell, Mr. Pemberton, Mr. Austin, Mr. Butt, Sir Thomas Wilde, Sir William Follett, Mr. Peacock, Sir Frederick Pollock, Serjeant Bompas, and Mr. Wigram, together with the counsel (except Sir John Dodson), who appeared below, conducted the proceedings before this tribunal. Lord Lyndhurst in August of the same year delivered the unanimous opinion of the Privy Council, reversing the court below and directing that all the papers be admitted to probate,*

* After the decision in the Privy Council the Corporation of Gloucester filed a bill to compel the payment of legacies amounting to £200,000 under the codicil. The bill was dismissed on the ground that the trusts indicated did not sufficiently appear. Corp. of Gloucester v. Wood, 3 Hare, 131 (1843).

Affirmed by the House of Lords, Corp. of Gloucester v. Osborn, 1 H. of Lds. Cas. 272 (1847.)

saying, at the outset of his opinion (2 Moore P. C. 430):

> "The extent of the property in controversy, the obscurity of some of the circumstances, and the extraordinary and mysterious nature of others, have given to this proceeding much interest, and have led to very full and able arguments at the bar, which have been attentively listened to and considered by the court, and with the more anxiety and care on account of the high character of the very able and learned judge whose decision we have been called upon to review."

In the following statement of the facts of this remarkable case frequent reference will necessarily be made to Sir Herbert Jenner's opinion, which in some instances treats them more fully than does the reporter in his excellent statement preceding Lord Lyndhurst's opinion.

The papers involved in these proceedings are respectively referred to in the opinions as papers A, B and C.

Paper A was dated December 2, 1834, and was headed "Instructions for the will of me, James Wood," etc. It appointed Alderman Wood, of London, and John Chadborn, Jacob Osborne, and John S. Surman, of Gloucester, executors, and desired them to take possession of and retain to themselves all testator's personal estate, subject to his debts and "such legacies as I may hereafter direct," and states that he will dispose of his real estate to such persons, and in such parts, as he may, by writing endorsed on said paper, direct. This paper was signed, but not witnessed.

Paper B commences, "I, James Wood, Esq., do declare this to be my will for disposing my estates as directed by my instructions," and declares the wish that his executors (without, however, naming them) shall take his whole estate, both real and personal, subject to his debts, and any legacies, etc., which he might thereafter make. It is dated the 3d of December, 1834—the day after the instructions—is

signed by the testator, and bears an attestation clause, and the signatures of three witnesses.

These papers, both in the handwriting of Chadborn, testator's legal adviser, were written on separate sheets of foolscap, and, when produced, were wafered together book-wise, and enclosed in an envelope with an endorsement designating its contents. (2 Moore P. C. C. 356–358). They were alleged to have been found by one Phillpotts, a friend of the deceased, in this condition, with the seal on the envelope unbroken, on the day after the testator's death, in his repositories, and the executors swore to having no knowledge of any other testamentary papers of the deceased.

Proceedings were at once instituted to establish these papers as the will of the deceased and application was made for probate in common form, but probate was stopped by caveats being entered by two persons alleging themselves to be next of kin. Thereupon, one Mrs. Goodlake appeared alleging herself to be the next of kin of the deceased, the executors at once admitted her interest, and, the other two parties having withdrawn (Id., p. 360), it was then decided to "propound the will and prove it by witnesses in solemn form of law" (2 Curt. 109—See 2 Moore, P. C. C. 361). There were, therefore, at that time but two parties before the court, the executors, and, as their opponent, Mrs. Goodlake. The allegation propounding the papers A and B for probate was brought in on June 4, 1836, and they must have been admitted to probate in due course as stated by Sir Herbert Jenner (pp. 113, 119, 122–123), but for the happening of a most extraordinary event.

Four days later, on the 8th of June one—

> "Thomas Helps received by the three-penny post a sealed paper or packet contained in an envelope, which was directed to 'Thomas Helps, Esq., Balham Hill, near London,' and, in the corner, written 'Important.' It was stamped, 'Strand, 2 A 2 Ju 8,' indicating that it had been put in at an office in the Strand on that day" (2 Moore P. C. C. 360).

This envelope contained two papers; first, the one known as paper C, which is as follows (2 Curt. 173; 2 Moore P. C. C. 360):

> "In a codicil to my will, I gave to the Corporation of Gloucester 140,000*l.* In this I wish my executors would give 60,000*l.* more to them, for the same purpose—as I—have before named. I wod also give to my friends, Mr. Phillpotts, 50,000*l.*, and Mr. Geo. Council, 10,000*l.*; and to Mr. Thomas Helps, Cheapside, London, 30,000*l.*; and Mrs. Elizabeth Goodlake, mother of Mr. Surman, and to Mr. Tho. Wood, Smith-street, Chelsea ("each" interlined) 20,000*l.*; and Sam Wood, Cleveland-street, Mile End, 14,000*l.*; and the latter Gentn Family, 6,000*l.*; and I confirm all other bequests, and give the rest of my property to the Execs, for their own interest.
>
> "JAMES WOOD.'
>
> "Gloucester City Old Bank,
> "July, 1835."

This paper—

> "appeared at the time when it was brought into the Court to have been mutilated to a certain extent; that is, it was burnt at one corner, and torn in one or two places, though not quite through the paper, one tear going through and dividing the Christian name from the surname of the deceased." (2 Curt. 96).

The other paper was a slip upon which was written in pencil (2 Curt. 114; 2 Moore P.C.C. 361):

> "The enclosed is a paper saved out of many burnt by parties I could hang. They pretend it is not J. Wood's hand; many will swear to it. They want to swindle me. Let the rest know."

Immediately upon receiving these papers, Helps communicated their contents to the executors, and, on the 13th of June, they were deposited in the registry of the court. Advertisements were inserted in the papers offering a reward of ten thousand pounds for the production of the codicil re-

ferred to by that contained in the envelope, and also for the writer of the penciled note enclosed with this paper, but neither the one nor the other was ever discovered.

On the same day the executors wrote to the Mayor of Gloucester, notifying him of the appearance of this paper, and, five days later, they again wrote him on the same subject, making no objection to the genuineness of this paper, and acting upon it in this, as well as in their search for another codicil, as a genuine instrument (2 Moore P. C. C. 443).

The codicil was in due time propounded for probate by the legatees (2 Curt. 114; 2 Moore P. C. C. 361, 365), and in the course of the subsequent proceedings several most extraordinary and unexpected facts were discovered. It was shown that when testator was taken with his fatal illness, the executors, Osborne and Surman—the former a clerk and the latter an apprentice, both residing with the testator—summoned the other two executors from London, so that all four were present in the house on the morning of the day upon which the testator died, his death occurring about 11 o'clock at night. On that morning Chadborn took from a desk in his own house the paper A, carried it to the testator's house and procured the paper B from Osborne who removed it from testator's private repositories, to which he had access. Thereupon Chadborn, in the presence of the other executors, attached A and B together in the manner already described, placed them in an envelope, which he had already at his own house endorsed, "The will of James Wood, Esq., 2nd and 3rd Dec., 1834," sealed this envelope with testator's seal and it was then placed among testator's effects where the next day Phillpotts discovered it (2 Curt., 125).

Upon testator's death the executors took full possession of his effects and searched through them, finding, as they alleged, no testamentary papers other than the two propounded. They admitted that certain cancelled notes of the bank, old letters, bills and "other useless papers, such as

old lottery hand-bills, or the like, all equally valueless and insignificant," had been burnt (2 Moore P. C. C. 383, 384), and that Chadborn had burned a deed (2 Curt. 153) and a "memorandum to the effect that he (Mr. Chadborn) was to take possession of his [testator's] deeds and manage his concerns after his death" (Id., 202), but denied having burnt anything of a testamentary nature. The evidence as to this of necessity depended upon the executors alone, for they kept the testator's servants, the only persons in the house at the time of testator's death, and thereafter, under their control, refusing the legatees access to them, except in the presence of their agents (Id. 178, 205). It was also shown that Chadborn visited testator's house alone early on the morning after testator's death, before Surman and Osborne were up, but for what purpose he did not disclose.

Much testimony as to handwriting was introduced and in considering it the court calls attention to the fact that the executors had facsimile copies made of the codicil, which were exhibited to witnesses before their examination in court, and upon which many of them based their opinions that the paper was a forgery. The court severely censures such a proceeding, pointing out that an opinion based on the view of a copy, which cannot of necessity be identical with the original, cannot be perfectly fair and unbiased (2 Curt. 181–188). Great stress was laid upon the fact that the amounts of the legacies in the codicil were expressed in figures when it was shown the testator's custom in writing was to express amounts in words; that he usually formed some letters in a different way from that in which they appeared in the codicil; and that the name of one of the legatees was incorrectly spelled (2 Moore P. C. C. 444). Attention was also called to the fact "that there were greater spaces left for certain words" in this paper "than those words would naturally occupy," and it was argued that "therefore blanks were left for certain words to be inserted" (2 Curt. 186).

No question was raised as to the capacity of the testator

to make a will at any time, nor was there any claim of undue influence (2 Moore P. C. C. 431).

The questions presented to the court for decision upon the propounding of the papers A and B were, as stated by Lord Lyndhurst (2 Moore P. C. C. 431), "confined to the construction of the papers" and "to the circumstances connected with these instruments" (See also 2 Curt. 128).

The effect of these two papers together was to give to the four executors named in paper A the whole of testator's immense estate, and it does not appear that there was any contention that they were invalid in any respect (2 Moore P. C. C. 417), the sole questions being, was the evidence of execution sufficient under the practice of the Ecclesiastical Courts, and, if so, was A sufficiently referred to in B to make the former a part of the latter? Both courts held the evidence of execution to be sufficient, the main question on this branch of the case therefore arising on the connection of the two papers—in other words, upon the explanation of the ambiguity of B referring to "instructions" and "executors" without further particularization. A great mass of testimony was considered in this connection, divided by Sir Herbert Jenner into two classes, that showing a probability of such a disposition as was made by the two taken together, and that showing a recognition of such disposition (2 Curt. 142). This testimony consisted largely of declarations of the testator, most of which were considered as to whether or no they "recognized" the disposition made under the construction of the papers contended for (2 Curt. 143, 144, 147, 148, 151, 153, 159, 160, 163, 164, 166 and 167). The Privy Counsel also considered them in this light and in this light only, as is demonstrated by the following remarks of Lord Lyndhurst:

> "In considering the evidence of recognition, I pass over the many loose declarations made at different times in general conversation. We place no reliance upon them" (2 Moore P. C. C. 437).

. . . . . .

> "But the most important recognitions are those which are proved by *Sutton* and *Stevens*, and to which it will be proper more particularly to advert. The first shows a motive for making a will, appointing executors, arising before the 1st of *December*, namely, the opinion of the customers as to the necessity of providing for the payment of their accounts" (p. 438).
>
> . . . . . .
>
> "It was not a loose and careless conversation, but, on the contrary, a very distinct recognition, very deliberately made, in the course of business, and is strongly confirmatory of the case of the appellants." (p. 441).

Sir Herbert Jenner rejected A on the ground that it was not sufficiently identified by B, and that the parol evidence did not show that the testator recognized the two papers as forming together one testamentary act. He did not pass upon B standing alone for the reason that there was no one before the court qualified to propound it by itself (2 Curt. 169).

The Privy Council directed that both papers be admitted to probate, Lord Lyndhurst saying (2 Moore P. C. 442):

> "The result then is this, we are of opinion that the paper A entitled 'Instructions,' was signed by the testator, and on the day it bears date. That in the paper B, the testator referred to these instructions, and to the persons whom he had therein named as his executors. That in addition to the proof of handwriting, there is sufficient confirmatory evidence to satisfy us that the paper A was the act of the testator, and that he meant, in mentioning his executors in the paper B, the executors whom he had previously named or appointed in the paper A."

The codicil (C), which operated to divest the executors of £350,000, or £210,000 (according to its construction) of the estate left to them by A and B, was bitterly contested on the grounds (1) that it was a forgery (2 Curt. 131, 201; 2 Moore P. C. 444) and (2) that it was revoked (2 Curt. 114, 201;

2 Moore P. C. C. 447). Sir Herbert Jenner rejected it, though satisfied of its genuineness on the score of handwriting, on the ground that the adminicular proof required by the rules of the Ecclessiastical Courts was insufficient to entitle it to probate, saying (2 Curt. 206):

> "Now, looking at all the circumstances of the case, *though the evidence in affirmance of the genuineness of the paper, as far as handwriting is concerned, is extremely strong; so strong, that if I were bound to pronounce whether it was or was not the handwriting of the deceased, I should have little hesitation in saying that I believed it to be his handwriting; yet it is impossible for the court to pronounce a judicial opinion upon that ground alone.* I am also of opinion in favor of the probability of the disposition contained in the paper; *but probability, coupled with the evidence of handwriting is not sufficient* to enable the court to pronounce judicially that the paper is proved to be the act of the deceased. I, therefore, pronounce also against the validity of the paper of July, 1835, which is propounded by the legatees as a codicil."

The Privy Council, however, directed that this instrument also be admitted to probate, taking the same view of the strength of the proof of handwriting as that taken by the court below, but holding the adminicular proof sufficient to satisfy the peculiar requirements of the Ecclesiastical Courts. While Lord Lyndhurst considers some of the parol testimony in this connection, most of the confirmatory proof considered by him is derived from the paper itself, as appears from his opinion on this branch of the case, which is as follows (2 Moore P. C. C. 443–447):

> "Then as to the codicil, we think it is (both the body of the instrument and the signature) in the handwriting of the testator. The evidence in the affirmative so greatly outweighs that which is opposed to it, as to satisfy us upon this point. The evidence has been [so] thoroughly sifted both at the bar and by the learned judge, as to render any further

examination of it unnecessary. It derives further strength and confirmation from the conduct of the executors; they were intimately acquainted with the handwriting of the testator, and with everything relating to him. They saw the codicil, and expressed no doubt of its genuineness. It is true that the letter of the 13th of June, to the Mayor of Gloucester, was written before they had seen the original, but they afterwards saw and examined it long before the post left London on that day. They made no objection, and in their subsequent letter, and in the search for another codicil, they acted upon it as if it were a genuine instrument. It was not till some time afterwards that they altered their course, and contradicted is as a forgery.

"But according to the rule of practice to which I have before adverted, the Ecclesiastical Court will not grant probate on the sole evidence of the handwriting of a testator where that is disputed. There must be some confirmatory proof; this confirmatory proof must evidently vary with each particular case, and would require to be more or less stringent according to the weakness or strength of the evidence as to the handwriting. In some of the cases referred to in the arguments at the bar, the confirmatory proof appears to have been very slight; we think, however, that there are in this case, in addition to the very strong evidence of handwriting, several circumstances leaving in the result no doubt on our minds that the codicil was the act of the testator.

"It is evident that he had it in contemplation to make a codicil or codicils to his will. This appears as well from the will itself as from the question put by him to Chadborn at the time of executing it. It is not indeed probable that he would have left so very large a property to be enjoyed solely by his executors.

"There is nothing in the dispositions which it contains to lead us to doubt the genuineness of the instrument: and if it does not notice every person who might naturally have been an object of his bounty, this may be explained by the circumstance of there

having been a previous codicil, to which this instrument refers.

"Several facts insisted upon to show that the paper was a forgery, tend strongly, upon investigation, to prove that it is the act of the testator: as an instance, I refer to the incorrectness respecting the name of Counsel. It is not probable that a person forging such an instrument would have misspelt it, particularly a person who must, from the nature of the dispositions, obviously have been well acquainted with the testator and his connections; so as to the use of figures instead of words, in stating the sums bequeathed to the legatees. A forger would have conformed to the usual practice of the testator; again, stress was laid upon the peculiar manner in which the *x* was formed in the word executors. It is a mere cross, whereas his usual practice was to make an *s* and then to cross that letter. But on a careful search, instances have been found among the books and papers of the testator, and which were, as the learned judge observes, very reluctantly produced, of similar deviations from his usual practice, and also of the same inaccuracy in spelling the name of Counsel. These are singular and striking coincidences, and there are others of a similar nature, strongly confirmatory of the evidence of the handwriting. It is true that these are minute circumstances but their very minuteness, we think, adds to their importance, and affords the strongest internal evidence of the genuineness of the instrument.

"It has been observed, and we think justly, that it is not at all probable that a person forging such an instrument would have referred to a former codicil, and thereby unnecessarily increased the means of detection. The very amount too of the legacies, and above all, the charges against the executors, would almost of necessity lead to opposition. Looking too at the different dispositions in the codicil, it is almost impossible to suppose that if the instrument had been a forgery, it would not have been detected by some inaccuracy, or exposed by some inconsistency.

"There are other circumstances of confirmation

which are not immaterial. It is proved that the testator had by a former will bequeathed a sum of £20,000 to the city of Gloucester. This was at a period when his circumstances were very different from what they were at the date of the codicil. He had in the interval received large accessions to his property. But unless the codicil be genuine, there is no bequest to to the City. In a conversation with Hopkins in February, 1836, after the date of the codicil, and in the presence of several persons whose names are given, the testator, in allusion to some suggestion made by the witnesses, stated that he had not forgotten 'old Gloucester' or 'poor old Gloucester.' And this corresponds with the evidence of Elizabeth Whalley, who states, that on a former occasion, he had said, 'He would do great things for old Gloucester.' It is stated, indeed, that he sometimes declared that the corporation should not be the better for him. But his declaration in favor of the City, and particularly that to Hopkins, made after the date of the codicil, agree with the documentary proof, and confirm it.

"Again, in the codicil there is a bequest to a relation, Samuel Wood, of £14,000, and to his family of £6,000. He had, in fact, six children. The six thousand and the fourteen make twenty thousand. He had given the same sum (£20,000) in each of the two preceding bequests, to two other relations, Mrs. Goodlake and Thomas Wood. Now it appears, that in a conversation with Samuel Wood, the testator had asked him how many children he had, and the form of that bequest appears to be the result of that conversation, and corresponds with it.

"These circumstances, more or less weighty, and in particular the internal evidence to which I have referred, are in confirmation of the codicil, and, added to what we consider the all but conclusive evidence as to the handwriting of this holograph instrument, satisfy us that the codicil was the act of the testator.

"But then it comes, nobody knows from whence, or from whom. It was sent anonymously to one of the parties claiming under it. This is a circumstance justly calculated to create suspicion, and would, under

ordinary circumstances, have been a most material and formidable objection. But the evidence of this case leads to the conclusion, that the papers of the testator have been improperly dealt with. It is proved, as we think satisfactorily, that Chadborn, who had committed or attempted, a fraud, in the annexation of the papers A and B, was in the house of the testator at an early hour of the day after the death, while Osborne and Surman were still in bed. The explanation is insufficient, and at variance with the proof. It is admitted that papers were burnt; and one of them probably of a testamentary character. These circumstances appear to us greatly to weaken the force of the objection.

"Adverting here again to the charges against the executors, would a person forging such an instrument have made such a charge? On what grounds? It was not known at the time when the codicil was produced, that papers had been burnt; that there had been anything irregular in the conduct of the parties. They were respectable in station and character; but the misconduct and burning are charged, and it turns out most unexpectedly to be true. The person, therefore, who produced this paper, must have had some knowledge of these transactions—some connection with them; and this explains the possession of the codicil, and shows why it was not produced from the repositories of the testator."

In the view of the case taken by Sir Herbert Jenner, he having rejected the codicil for want of sufficient adminicular proof, according to the requirements of the Ecclesiastical Courts, it became unnessary to pass upon the other question, that of revocation. With reference to the condition of the codicil and the contention based thereon, he says, however, (2 Curt. 114):

"The paper accompanying this writing is sworn to have been received in the same state as it is now before the court, that is, torn, but not entirely through, but a part of the corner of the paper is burnt; and

it has been argued from these circumstances, that, whether the paper be or be not a codicil, whether it be in the deceased's handwriting or not, and whether subscribed by him or not, are points wholly unimportant, because it is a cancelled document; and that objection was stated at the time when the allegation propounding the paper was debated; but the court was of opinion that the cancellation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have been saved out of many burnt by parties the writer could hang; and, therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper."

(Id. p. 174):

"The paper itself was produced in a very mysterious manner. It was sent through the three-penny post to Mr. Helps, and communicated to the executors at the earliest period. And although very large rewards have been offered, the writer and transmitter of the letter has not thought proper to come forward. The case, therefore, labors under a burden, which it is difficult to remove, of having no person to give any account of its execution by the deceased. The letter which accompanies the paper contains undoubtedly a charge against some person or other of a most atrocious character, namely, an attempt to burn the paper, along with others. Who are the persons alluded to in this letter the court has no means of exactly ascertaining; but from the nature of the plea given in, it is impossible not to see that the executors, or some or one of them, or some person or persons connected with them, and acting under their directions, are supposed to have some knowledge, at least, of the alleged destruction, if not themselves the immediate agents. The court will not stop to inquire whether or not it is in a cancelled state; or if it be so, whether it was the act of the testator himself; because there is no clue to this fact, and the court must be satisfied, in the first

place, that the paper was ever executed by him; and secondly, if it was so executed, how it was obtained from his possession, and treated so as to give it the appearance it now presents."

The Privy Council, having held that the requirements of the Ecclesiastical Court as to adminicular proof were fulfilled, was of necessity required to decide the question of revocation, and held that there was no evidence in support of that contention, Lord Lyndhurst saying (2 Moore P. C. 447):

"Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the onus to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom and under what circumstances does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practiced, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be proved."

The three other cases previously referred to, in which testamentary papers had been sent anonymously through the mails, were all decided before Hitchings *vs.* Wood. The first in date is Crisp & Ryder *vs.* Walpole, 2 Haggard's Eccl.

Reps. 531 (1829). In that case the testator died in November, 1826, and in the same year his will, dated December, 1822, and nine codicils thereto, was admitted to probate. In 1828 Ryder received through the two-penny post an envelope, addressed to him, which contained what purported to be a holographic codicil, executed by the testator in 1823, Ryder, together with several others, being named in this codicil as a legatee.

Sir John Nicholl refused to grant probate of this instrument, there being no adminicular proof, as required in that court, in support of the proof of handwriting, saying (p. 535):

> "It is a rule of this court that evidence of handwriting alone is not sufficient to establish a testamentary paper without something to connect the act with the deceased."

The second case is Rutherford *vs.* Maule, 4 Haggard Eccl. R., 213 (1832), which was a contest over the estate of Frances Mary Shard, who died in May, 1819, a widow sixty years of age. The following year, in April, administration upon her estate, amounting to about £24,000, was granted for the benefit of the Crown, no next of kin having been discovered nor any will propounded. Four memorials, properly supported, were addressed to the Crown setting forth that the deceased had left no will and no relations, and that it had been her intention to divide her property among the individuals named in these memorials, and in December, 1823, the Crown made certain grants in accordance with these memorials, taking security for their repayment. In February, 1820, one Charles Shard, a nephew of the husband of the deceased, had received through the mail an anonymous letter addressed to him, covering a paper purporting to be a holographic will of the deceased, in which he, together with two others, was named as executor, the said paper bearing date in 1819, one month before the death of the alleged testatrix. This paper was not offered for probate, though it was exhibited by Shard

to some of the parties named therein, and was retained by him until June, 1820, when, together with all other papers of the deceased, he turned it over to the administrator representing the interests of the Crown. The parties named in the will were substantially the same as those on whose behalf the memorials before referred to were presented.

After the grants were made as above stated there were no further proceedings with reference to this estate until in 1830, when one Rutherford called in the administration, alleging himself to be the next of kin of the deceased. In the middle of the following year the Crown's proctor in looking over the deceased's papers discovered the holographic will and letter accompanying it, received ten years previously by Shard, and notified the parties interested of the discovery. Then, for the first time, the executors thought proper to set up the paper and it was accordingly propounded.

Sir John Nicholl refused probate of this paper, calling attention to the fact that in 1820 the parties interested under it had no interest in propounding it for the reason that they expected to get grants, which they ultimately received, and that they then treated it as a forgery, but, upon the appearance of one alleging himself to be next of kin, it for the first time became to their interest to have this paper established, as they might then be compelled to relinquish the grants, and they then changed front and propounded the will as genuine (p. 223). He holds the evidence of handwriting to be unsatisfactory, attaches no importance to the evidence tending to show a probability of such dispositions as were made by the paper in controversy, and expresses himself as satisfied that the testatrix had neither the ability nor opportunity to make the will on the day it bore date.

The last of these cases is Bussell *vs.* Marriott, 1 Curteis, 9 (1835).

The testator, Pettiward, died in November, 1833, leaving

a will executed in May, 1832, and a codicil executed in June, 1833, both of which were undisputed. In January, 1834, however, one Robert Marriott received a letter bearing the London post-mark to the following effect (p. 11):

> "Inclosed is a paper left (with the strictest injunctions to secrecy) by the late Rev. D. Pettiward, nearly the last time he was in London, with directions to be sent by post after he should have been dead a month at least." "London: January, 1834."

Enclosed with this letter was a piece of paper on which was a note purporting to have been written by the deceased addressed to Robert Marriott, and also the disputed codicil, by which the deceased released said Marriott from the debts owed by him, and named him his executor. It appears elsewhere that this operated as a legacy of about £6,000. This codicil purported to be in the handwriting of the testator and signed by him, but was not witnessed.

Sir Herbert Jenner rejected this paper on the ground that the adminicular proof required by the Ecclesiastical Courts, taken in connection with the proof of handwriting, was insufficient to entitle the instrument to probate. In the course of his opinion he says (p. 13):

> "Now the factum of the codicil depends entirely upon the evidence of handwriting, which it is admitted is not alone sufficient to enable the court to pronounce for any testamentary paper, but there must be some circumstances adminicular to that evidence tending to connect the paper with the alleged testator, the requisite stringency of those circumstances varying according to the strength of the evidence as to handwriting; but still it is admitted that evidence of handwriting, done however strong, is not sufficient proof of the factum of the instrument."

And again (p. 22):

> "Considering then the rule, as indeed has been fully admitted, to be clearly established; that evidence of handwriting is not sufficient to establish a

testamentary instrument, but that there must be something to connect it with the deceased; and admitting the preponderance of the evidence as to handwriting to be in favor of the genuineness of the paper; it would seem to be a waste of time to enter into a minute consideration of it; the court will therefore proceed to consider whether the circumstances which are stated to connect the paper with the deceased are sufficient to produce that result."

And concludes (p. 32):

"Upon the whole, then, of this case, I am decidedly of opinion that there are no circumstances of probability, nor declarations, nor facts, to connect this instrument with the deceased; and although the preponderance of evidence upon the abstract question of handwriting may be in favor of the party propounding it, yet it is by no means conclusive even upon that point; and taking all the circumstances into consideration, I feel myself bound to pronounce that the parties have failed in proving this instrument to be the genuine act of the testator, and I therefore pronounce against it."

Notwithstanding the extraordinary feature of the anonymous appearance through the mail of the testamentary papers involved in these four cases, the courts did not in a single instance vary from the established rules of evidence or procedure in force in the Ecclesiastical Courts and applicable alike to all wills, no matter how or whence produced. Thus in Rutherford *vs.* Maule the court sitting as judge both of the law and the facts rejected the paper because satisfied that the weight of evidence was against its validity, the proof being in every way insufficient and it being shown in addition that the testatrix could not have executed the paper at the time it bore date.

In Crisp and Ryder *vs.* Walpole, and Bussell *vs.* Marriott, as well as in Wood *vs.* Goodlake (in the Prerogative Court), the papers propounded were rejected solely because the

proof in support of them was held to be insufficient to meet the peremptory rule of the Ecclesiastical Courts requiring in addition to proof of handwriting, no matter how strong, adminicular or corroborative proof as a condition precedent to probate. The quotations (*supra*, pp. 42, 50, 52, 53) from Sir Herbert Jenner and Sir John Nicholl in these cases are pointed and clearly indicate the difference between the requirements of the Ecclesiastical Courts and the Courts of Common Law in this respect, and Lord Lyndhurst recognizes it when he says (2 Moore P. C. C. 436):

> "According to the rule of the Ecclesiastical Court in granting probate, proof of the handwriting alone of the alleged testator would not, in such a case, be sufficient. There must be further adminicular or corroborative evidence."

Speaking of this subject, Taylor, in his work on Evidence (9th Ed., Chamberlayne's Am. Notes, 1897), says (Sec. 966):

> "Again, in Ecclesiastical Courts, the testimony of a single witness, though *omni exceptione major*, is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call 'adminicular circumstances.' This doctrine is now of little practical importance, as the spiritual courts have, by a series of legislative improvements, been shorn of most of their jurisdiction over the laity, though they still possess it over the clergy."

Doctor Ayliffe, a recognized authority on the Cannon Law, whose statement in this regard is approved by Sir Herbert Jenner Fust, in Evans *vs.* Evans, 1 Robertson Eccl. Rep., 171 et seq., speaking of the arbitrary rules of evidence applied by the Ecclesiastical Courts (Parergon Juris Canonici Anglicani, 2nd Ed. Lond. 1734, pp. 444–446), says:

> "Now that is called full proof which gives so great an assurance to the judge that he seems to himself to be fully instructed in the merits of the cause. And this kind of proof is made by two or three witnesses,

> at the least. For there are some matters which, according to the Cannon Law, do require five, seven, or more witnesses to make full proof; yet full proof can not be said to be made by one witness alone. . . . A half proof is that which does not make full proof; and of this kind we may reckon the testimony of one witness, fame, private writings, and the like. . . .
>
> "According to the Civil and Cannon Law, proofs are arbitrary, and depend on the mere discretion of the judge; for the judge may *ex animi sui motu* give credit to witnesses, though their depositions be not clear."

From the above it is apparent that had any one of these three cases been in a court of probate in this jurisdiction, governed as it is in matters of evidence by the rules of the common law, the respective papers must, *on the proof of handwriting alone*, have been admitted to probate.

It is to be noticed that both Crisp & Ryder *vs.* Walpole, and Bussell *vs.* Marriott were decided before the questions arising upon a similar state of facts were presented to the Privy Council in Hitchings *vs.* Wood, and that in the lower court, in the last mentioned case, Sir Herbert Jenner takes the same view of the questions presented as was taken in Crisp & Ryder *vs.* Walpole, and Bussell *vs.* Marriott. When, however, this state of facts was presented to the Privy Council, the court of last resort, in a case involving four and one-half millions of dollars, one million six hundred and fifty thousand of which purported to be disposed of by the paper so mysteriously produced, that tribunal did not hesitate to admit the instrument to probate, and, though adhering to this rule of evidence as to adminicular proof peculiar to the Ecclesiastical Courts, intimated that the court below, under the influence of the peculiar and mysterious circumstances of the case, had carried this rule too far.

That the condition of the paper in controversy in the case at bar and the circumstances of its appearance excited the suspicions of the trial justice in the court below, and, in the

absence of any precedent based upon similar circumstances being known to him or brought to his attention, unduly influenced his mind, is apparent from his observations in his charge to the jury, where he says (Rec., pp. 128–129):

> "If this will had been found . . . among the papers of Joseph Holt, that circumstance would lend to the instrument a presumption of genuineness. If it had been enlightened by the testimony of any one of these subscribing witnesses, probably this question would not have been put before you for determination."
>
> . . . . . .
>
> "If we were enlightened in this case as to the source from which this paper emanated just before it reached the office of the register of wills, doubtless it would throw a great deal of light upon this question."
>
> . . . . . .
>
> "The difficulty is that this paper was deposited in the mail by some person who, for some fraudulent purpose of his own, deems it necessary to be quiet, or who is so recreant to duty that he does not come forward to indicate the fact that it was so deposited."

The legatees under this will were certainly not, as matter of law, its natural custodians, called upon to explain the source from which it came, while as matter of common experience they would be the last to know of its existence. The claim that it was not in the custody of the testator at the time of his death in a condition of perfect integrity depends exclusively upon the testimony of the two caveators interested in its destruction, who alone secured possession of all Judge Holt's papers immediately after his death, and who occupied themselves in the secret examination and the unlawful destruction by burning of such of them as they chose to suppress.

"*In odium spoliatoris, omnia præsumuntur.*"

By the ruling of the Privy Council in the case of Hitch-

ings *vs.* Wood, above cited, it appears that the genuineness of the paper in that case being sufficiently established, the burden was cast upon the opponents of the will to prove its revocation, and that that burden could not be discharged by mere suspicions growing out of the condition of the paper and its anonymous appearance through the mail, especially when it appeared that those interested in its destruction had an opportunity to destroy it and actually availed themselves of that opportunity by destroying some papers.

THE ISSUE OF REVOCATION.

The First, Second, Third, Fourth and Fifth Assignments of Errors.

The errors assigned as to the issue of revocation cover the exceptions taken to the admission of evidence and the instructions to the jury given and refused with respect to that issue.

While a large mass of wholly incompetent testimony was admitted in evidence to prove revocation of the will in controversy, it will be found upon examination that there was no competent evidence whatever offered upon that subject and that the prayers of the caveatees, in legal effect requesting the court to instruct the jury peremptorily to find a verdict in their favor upon that issue should have been granted.

In considering the questions arising upon the issue of revocation, it is necessary, as before explained, to assume the original genuineness and validity of the will in controversy. One can destroy the act of another but can revoke only his own act.

This revocation may be accomplished by acting directly upon the paper itself, by mutilation and the like, or it may be by an act extraneous to the will.

The several modes of revocation may be proved in various

ways, and before considering the questions raised by the errors assigned as to this issue, it is necessary to consider each of those modes in order to determine the questions presented.

There are but four modes of revocation known to the law in this District, namely—

1. By word of mouth only.
2. By a later inconsistent will.
3. By an express revocation in writing.
4. By burning, tearing, canceling, obliterating or other act of destruction or defacement with the intent to revoke.*

It will now be shown that no competent evidence was offered to establish revocation by any of these modes.

No Evidence of Revocation by Word of Mouth.

The Record in this case not only discloses no evidence tending to show a revocation by word of mouth, but no attempt was made to prove such.

The twenty-second section of the Statute of Frauds provides that:

> "No will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed *by any words* or will *by word of mouth only*, except the same be, in the life of the testator committed to writing, and *after the writing thereof read unto the testator and allowed by him and proved to be so done by three witnesses at the least.*"
>
> Alex. Brit. Stat. 513.

It is to be observed that this statute not only forbids the revocation of a will by any parol will—"will by word of mouth only"—but, also, and separately, forbids the revocation "by any words." By its express terms, therefore, this

* Marriage and birth of issue would of course revoke, but as Judge Holt never remarried after 1860, and never had any issue, no question could arise under this head.

statute extends to and excludes every possible form of parol revocation.

No writing such as the statute requires was produced, no witness testified to having seen any such writing or to any such writing ever having had existence. Nor was it even attempted to be shown that Judge Holt ever in his life uttered a revocatory word as to this paper.

In this condition of the Record the first form of revocation is eliminated from consideration.

No Evidence of Revocation by a Later Inconsistent Will.

It is to be observed that this form of revocation arises by construction of law from the terms of the instrument, and it is essential to the establishment of the claim of revocation by this means that not only the fact of the execution of the later will be shown, but that its contents be placed before the court in order to the judicial construction of it as to whether revocatory or not.

No later will than the one in controversy was produced and it is submitted that no competent evidence was offered in the case to establish revocation by this means.

Some attempt was made to prove that Judge Holt had executed a will some time after February, 1873, but no such will was produced.

No witness pretended to have seen such a will or to have any knowledge that any such will had ever in fact existed.

The attempt to maintain this theory by alleged declarations of the testator was not permissible, and the evidence, even when thus erroneously admitted, was legally insufficient, and the question should not have been submitted to the jury.

In order to maintain the claim of revocation by a subsequent will it is essential—

1st. To prove by clear and satisfactory evidence the actual execution of a later will and its continuance in force to the

death of the testator, and that such will be inconsistent with the prior will.

2d. To produce such later will, or

3d. If such will cannot be produced, to establish by clear and satisfactory evidence its provisions to have been so far inconsistent with the former will that the two could not stand together.

See Thornton on Lost Wills (1890) 162.

In Nelson *vs.* McGiffert, 3 Barb. Chancery, 158 (1848), a will executed in 1832 was propounded. It was attempted to show that this will was revoked by a later lost will, the execution of which in 1837 was proved. As to the proof of a will not produced, relied on to revoke a prior will, duly proved, Walworth, Chancellor, says (p. 164):

> "The evidence of the witnesses on the part of the appellants in this case fully established the fact of the due execution of a testamentary paper by the decedent in 1837, but the appellants entirely failed in showing that it was a revocation of the will of July, 1832, or that it was inconsistent with that will in any respect. Neither of the witnesses says anything as to the contents of the testamentary paper of 1837, or that it contained any clause revoking the will of 1832, or any part thereof. A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will in some of its provisions merely, it is only a revocation *pro tanto*. (Brant *vs.* Wilson, 8 Cow. 56.) Where a subsequent will is made, and there is no proof that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will."

In the case of Wallace *vs.* Wallace, 114 Massachusetts, 510 (1874), upon motion in the probate court to frame issues for trial by a jury, the question raised was referred to the full court. As to what proof of a lost will should be

given to show that it revokes an earlier existing will, Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, says (p. 512):

> "But when a testamentary instrument is lost or destroyed, it cannot be admitted to probate without clear and satisfactory proof of its whole contents. Davis *vs.* Sigourney, 8 Met. 487. If it can be proved that a later will was duly executed, attested, and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation, and it can be made available only by allowing it to be set up in opposition to the probate of the earlier will, in accordance with the practice established in the English Ecclesiastical Courts before the Declaration of Independence, and adopted by the courts exercising similar jurisdiction in New York and New Jersey. Helyer *vs.* Helyer, 1 Lee, 472. Nelson *vs.* McGiffert, 3 Barb. Ch. 158–164. Day *vs.* Day, 2 Green Ch. 549."

In Cutto *vs.* Gilbert, 9 Moore, P. C. C. 131 (1854), the widow of Abram Cutto, the testator, propounded a will, executed in 1825, probate of which was resisted by testator's sister, on the ground that another will had been executed in 1852, revoking that of 1825, but that the latter will was lost. Testator died in 1853, possessed of considerable personalty, but no realty, and leaving his sister as only next of kin. Three witnesses testified they had witnessed a will for the testator in 1852, but were unacquainted with its contents. One of the witnesses, however, had seen the words: "This is the last will and testament of." The court below held that these words were sufficient to revoke the will of 1825. On appeal this ruling was reversed, Doctor Lushington for the court saying (p. 140):

> "We agree in the position laid down at the bar, that the *onus probandi* lies upon her (Mrs. Gilbert).
>
> . . . . . .

"The first fact to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe that we are of opinion, that where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur in the opinion which has been expressed by very learned persons, that to revoke an existing will by parol evidence alone that another will has been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and, consequently, that such oral evidence ought to be stringent and conclusive.

"Mrs. Gilbert has pleaded, that in the month of August, 1852, the testator executed his last will and testament in writing; that he thereby revoked his will of the 11th of August, 1825, and that he intended to make a provision for her and her daughters; and she has further alleged, that after the execution of such will, the testator declared that he had executed his will. The evidence to establish these facts is to be found in the testimony of three witnesses, Watkins, Floyd, and White."

. . . . . .

(P. 142): "Now, what is the result of this evidence, taken in the most favorable light for the respondent? It is this, that the deceased executed a paper, the only contents of which proved, or what can be argued to be proved is, that it commenced with the words, 'This is the last will and testament.'

"It would be impossible to contend that the mere execution of a testamentary paper, subsequent to the will of 1825, would be a revocation, for it might be a codicil only, it might be confirmatory; and as the *onus probandi* is upon the respondent to show that it was revocatory, such revocation could never be established by proving the execution of a testamentary paper only; and in effect the question comes to this, whether the evidence of Floyd, stating that the paper

commenced with these words, 'This is the last will and testament,' and the remark to White that he had executed his will, works a revocation in law, such will being not forthcoming, and the other contents of the will being totally unknown."

. . . . . .

(P. 146): "Now, let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, 'This is my last will and testament.' We are of opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument."

. . . . . .

(P. 147): "Considering, therefore, that the respondent, upon whom the *onus probandi* lies, has failed to prove what the law requires, the execution of a subsequent will expressly revoking the former, or of different contents, we must reverse the judgment of the court below, and pronounce for the will propounded by Mrs. Cutto."

This case is cited by Campbell, C. J., in Brown *vs.* Brown, 8 E. & B. 876–887, where, when speaking of the revocation of an existing will by a later lost will, he says:

"And the same doctrine is laid down in Cutto *vs.* Gilbert, 9 Moore, P. C. 131, by another great judge, Doctor Lushington, than whom no one has had more experience in such cases."

In Goods of Ripley, 1 Sw. and Tr. 68 (1858), the testator, Ripley, colonel of a native Bengal regiment in India, executed his will there and mailed to his solicitor in England a document which, he wrote, was a copy thereof. Sometime later he mailed another document which, he wrote, was a copy of a codicil to the aforementioned will, a copy of which he had previously forwarded. The codicil bore the testator's signature and the names of two witnesses, one of whom was proved to be dead, and the other, if alive, could not be found. Ripley was killed during the mutiny at Delhi, and the original will and codicil were not found among his effects.

On a motion to decree probate of the will and codicil, Sir C. Cresswell says (p. 69):

> "This was an application for probate of a supposed will and codicil (the alleged testator having been murdered at Delhi) as contained in what were said to be copies of the will and codicil sent over to this country. It seemed to me at the time when the application was made, that I could not grant it upon principle, there being no proof of the *factum* of the original will and codicil *except the declarations of the supposed testator, made after their execution, that he had made such a will and codicil.* But as the circumstances of the case caused me to feel rather disposed to grant probate of the instruments, if I could do so with propriety, I was anxious to have an opportunity of seeing whether any instance could be found in which the Prerogative Court had granted probate under similar circumstances. No instance could be found; but in the case of Doe d. Shallcross *vs.* Palmer, 16 Q. B. 747, a Common Law Court refused to receive in evidence the declaration of a testator, made after the execution of his will, that an interlineation in it was made before execution. If a declaration made after execution as to an interlineation could not be received, *a fortiori* a declaration as to the actual making of a will could not be received. There being no other evidence as to the

factum of the will, I am bound to refuse probate of the copy. I must reject the motion."

Clark *vs.* Morton, 5 Rawle (Pa.), 235 (1835), was a contest over the will of Judge Morton. A witness testified that testator had told him he had written his will himself; the court, over objection, then permitted him to narrate the contents of the will as stated to him by the testator. The court instructed the jury that if they believed from the testimony of two witnesses proving repeated declarations of the testator that he had executed a will, that it existed at the time of his death, and had since been spoliated, and that the contents of the will were as proved by witnesses, then they must find for the plaintiffs.

This the jury did and defendants excepted.

Kennedy, J., in reversing the judgment, says (p. 240):

"The main question to be resolved in this case is, whether the making of a will in writing and its contents can be established by parol evidence of the verbal declarations of the deceased going to show that he had made a will in writing and how he had disposed of his estate by it.

"By our Act of Assembly of 1705, a will made in order to convey lands must be in writing and proved by two or more credible witnesses. Now it is perfectly obvious that the proof required to be made of a will for such purposes, necessarily involves the proof of its actual existence. But can this, according to the true meaning of the act of assembly, be done by giving parol evidence of the verbal declarations of the party alleged to be the testator, without producing the will itself; *or proof being made that it had been seen, or that the party claiming in opposition to it, had admitted its existence?*"

. . . . . .

(P. 241): "If, however, the verbal declarations made by a person before his death, stating that he had made his will in writing, and that he had thereby disposed of his estate in the manner then men-

tioned by him, are, after his death, upon proof being made by two credible witnesses of their having been uttered by him, to be taken for his will, *without any proof of such writing having ever been seen*, the great objects of the act of assembly will be defeated, and the actual writing of wills for the purpose of passing lands as required by it, dispensed with. Because it is easy to perceive that a will disposing of the land of the deceased may be established by this means without a word, or even a syllable having been written for the purpose. It would be sufficient after his death to prove by two witnesses that they had heard him say before his death that he had made his will in writing and disposed of all his estate in a particular way, then mentioning how it was. In such case, if no written will in fact was ever made, it would of course be impossible to produce it; and then, according to the doctrine contended for by the counsel for the defendants in error, the declarations of the deceased ought to be received, as the best evidence that could be had of the making of it, seeing none could be found. Now, although we might, without knowing that the person making such declarations had, as many often have had, certain reasons for concealing or perhaps for misleading those around them, in regard to the disposition that he wished to have made of his estate after his death, be inclined to think that his declarations in this behalf afforded some presumption of his having made a will in writing; yet, as soon as it is ascertained that no such will can be found, this presumption I think entirely vanishes; hence it appears to me that in the absence of the *corpus* of such will *and of all evidence that it had ever been seen by a witness, the declarations of the deceased ought not to be admitted in evidence for the purpose of establishing it.*"

He then disposes of the contention that these are declarations against interest, and as such admissible, and says (p. 243):

"If the declarations of the deceased were to be received as evidence for such purpose [*i. e.*, to establish the will as above stated], it would necessarily follow

for the same reason, that a written will, produced after the death of one who had made it, and proved in due form might be revoked and set aside by proving that the testator had declared that he had revoked it in due form by a writing signed by him for that purpose, *although no such writing could be produced, or evidence given showing that it had ever been seen by any witness*, which would, as it appears to me, be directly repugnant to the whole meaning, letter and spirit of the act of assembly, and would, in short, be making the mere verbal declarations of the deceased supply what the act has expressly declared must not only be in writing, but that the writing itself must be proved at least by two witnesses."

In Caeman *vs.* Van Hark, 33 Kans. 333 (1885), the testator died in 1883, leaving a validly executed will, dated in 1874. This will was "attacked upon the ground of revocation only" (p. 336), in that it had been revoked by a will made in 1877, which it was alleged had been destroyed by testator's widow.

Johnston, J., for the court, after quoting the statute regulating the revocation of wills, says (p. 336):

"The plaintiffs claiming that the will in contest has been revoked and superseded by a later one, it is incumbent upon them under the provisions of the statute last quoted, to prove by competent testimony that the instrument of a later date purporting to be a will and to have the effect of revoking an earlier one admitted to be valid, was executed with all the formality and solemnity prescribed by the statute in the making of a will. They must first show the existence of such an instrument; that it was made in writing by the testator when he was of sound mind and memory; that it was signed by him at the end thereof, or by some person in his presence and by his express direction and attested and subscribed in his presence by at least two competent witnesses who saw the testator subscribe or heard him acknowledge the same; and it must also appear that such instrument either in express terms re-

voked the former will or that its provisions, in devising the property, were so far inconsistent with the earlier will that it would operate as a revocation."

. . . . . .

(P. 337): "There is no testimony offered showing when the alleged later will was made, by whom it was drawn, whether it was regularly signed by the testator, nor that it was subscribed in the presence of attesting witnesses. *No witness is offered who claims to have seen such a will, nor does anyone assume to have personal knowledge of what its provisions were.* The testimony that was offered was very vague and unsatisfactory."

He then reviews the testimony and continues (p. 338):

"Plaintiffs undertook to supplement this testimony with statements made by the testator during his lifetime, and after the date when the subsequent will is alleged to have been made. This testimony with some we have already adverted to was clearly incompetent and is not entitled to any weight in the determination of the issue in this case.

"A wide range of inquiry is given in a case where the validity of the will is challenged on the ground that the testator is not of sound mind and also where it is claimed that the will was procured by any undue influence involving the mental condition of the testator at the time the will was executed. In such cases, the declarations of the testator, made at or before the execution of the will, are competent evidence; but upon the question of the revocation of a will once properly executed and admitted to have been valid a different rule obtains. The declarations of the testator in such a case are not competent testimony, unless they accompany the act by which the will is revoked and they must be at or so near the time as to become a part of the *res gestæ*. All other declarations are mere hearsay and are not admissible to impeach the will."

Alleged declarations of Judge Holt that he had made a

will giving pictures to Mr. Barclay's mother (Rec., p. 29); that Washington Holt would attend to his affairs (Rec., p. 37) and get everything that he had (Rec., p. 79) and the like, not only fall far short of establishing the actual execution of a later will and proving its contents, but were not even admissible in evidence.

The claim, therefore, that the will in controversy was revoked by a subsequent will is absolutely unsupported.

No Evidence of an Express Revocation in Writing.

This form of revocation could only exist in a later will containing a revocatory clause or in a later writing expressly revoking this will in terms or all wills of antecedent date.

That no revocation by later will was accomplished has already been demonstrated.

No writing of a revocatory nature was produced nor was any evidence offered tending to show that any such paper ever existed. This form of revocation like that by word of mouth is without even the pretense of support by anything in this Record.

No Evidence of Revocation by Burning, Canceling, Tearing, Obliterating or other Form of Destruction or Defacement.

The will in controversy, when offered for probate, as already stated, was both torn and burned and it is freely admitted that its condition is sufficient for its effectual revocation so far as mere physical defacement is concerned. If done by Judge Holt or anyone else by him authorized, the presumption of law that it was done with the intent to revoke would at once arise. This presumed intent may be supported or rebutted by extraneous facts and circumstances tending to show the state of mind and intentions of the testator at the time the act was done.

All these propositions were admitted by the caveatees at

the trial and in the Court of Appeals and have never been disputed in this case.

As, however, no one but the testator or some one by him expressly authorized can revoke a will by burning or the like, the first inquiry is—

Who did the act by which this paper was put in its present condition?

Important as an answer to this question is, especially to those setting up the revocation, the fact remains that every witness examined in the case absolutely denied any knowledge whatever of the paper or its condition until its receipt by the Register of Wills.

To establish revocation by burning, tearing, canceling or obliterating the will, it is well settled that some evidence affirmative or presumptive must be given that such act of burning, tearing, etc., was done by the testator or by some other person by his direction. Until this is done, it is not material to inquire as to the intent of the testator. Intention is a mere quality or attribute, while the act is the substance. The establishment of the substance is essential before an attribute to it can be ascribed.

Evidence, therefore, or even absolute and undisputed proof that, after the date of the paper in controversy, Judge Holt's affection for his relatives increased, that their relations became close and intimate, and that his fondness for the persons named in his will had given place in later life to dislike and even hatred, in an inquiry as to whether or no he did the act of burning, tearing, etc., could not aid the court in the slightest degree in determining that substantive fact. And the authorities conclusively establish that, however strong the proof of the intent to revoke may be, such proof cannot establish revocation, until the doing of a revocatory act by the testator or by some other person, by his express direction, be proved.

In Cheese *vs.* Lovejoy, 2 L. R. Prob. Div. 251 (1876,) the testator threw his duly executed will in a waste basket,

having first written on the back: "All these are revoked." A servant picked up the will and left it lying about the kitchen, where it still was when the testator died. It was held there was no evidence of revocation. On application for the allowance of an appeal from this ruling, James, L. J., says (p. 253):

> "We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below: 'All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

Andrew *vs.* Motley, 12 C. B. N. S. 514 (1862), was an action of ejectment. J. Andrew died leaving a will dated in 1786. One of the devisees who took an estate for life under this will in some of the property entered and resided there till his death in 1857. On his death a paper purporting to be a will of Andrew, dated in 1788, was found in a box among the effects of this devisee with the probate of the first will, the later will having its seal torn off.

The plaintiff claimed under the first will and the defendant under the second. The court instructed the jury that they might infer that the testator had intended to recall the second will from which the seal was torn and treated it as nullity, or that he had given it to the person in whose custody it was found to have it destroyed. The jury found for the plaintiff. Williams, J., held this to be error, saying (p. 523):

> "It is clear that a man cannot simply abandon a will without more. Even before the Statute of Frauds a will could not be canceled without the testator's demonstrating in some way that he intended to revoke it. Swinburne on Wills, 990. But with regard to wills made after the Statute of Frauds, it is clear that

> a man cannot revoke his will even by manifesting in the strongest way his intention that it shall no longer operate unless he pursues one of the modes pointed out by the sixth section. There is no pretense for saying that anything of that sort was proved or found here."

In Hise *vs.* Fincher, 10 Iredell Law, 139 (1849), the testator gave his will to his son with instructions to burn it. The son deceived his father by throwing another paper on the fire preserving the will intact, and after the testator's death the will thus preserved was propounded for probate. The only issue was revocation.

Ruffin, C. J., held that on these facts no revocation could have taken place. After stating that the North Carolina statute regulating the revocation of wills was substantially the same as the Statute of Frauds, and quoting it in part, he says (p. 141):

> "It is obvious that the main purpose of the act is to alter the rule of law by which the revocation of a written will duly attested could formerly be established by parol proof merely; and that is done, by requiring the intention to revoke to appear, not merely from the mouths of witnesses, but also by some overt act, apparent in another writing or on the paper itself alleged to have been revoked.
>
> . . . . . .
>
> "But the very question is, whether upon this parol evidence, by itself, an intention to revoke can be found, or, if the intention be granted whether the law will allow such intention to burn and revoke to be, in fact and law a burning and revocation. The statement of the question seems to furnish an answer to it in the negative. The statute positively requires things to be done and not merely said or intended to be done. The court cannot dispense with those acts, upon the ground that in requiring them the statute put it in the power of a bad man to deceive and defraud a testator. That was for the consideration of the legislature; which body has, nevertheless, used

language on the subject, which is clear and explicit, and which, therefore, the judiciary must observe, though, in a few very extraordinary cases it admits the possibility of fraud and imposition. For it is clear the legislature deemed it the better policy to submit to that inconvenience in a solitary instance, now and then—since human sagacity is not competent to guard perfectly against fraud of every kind—than to let in the more extensive and frequent mischief, arising from perjuries committed in proving verbal declarations to burn or cancel a will, and a supposed belief of the testator that it had been done. We conceive the words of the act are diametrically opposed to the hearing of any evidence of the kind, and that to effect a revocation of a will there must be deeds within some one of the definite words used.'

In Gains *vs.* Gains, 2 A. K. Marsh. 190 (1820), the claim was set up that the testator wished to destroy his will but had been forcibly prevented from doing so. In disposing of this contention, Boyle, Ch. J. says (p. 191):

"The act concerning wills, after having prescribed the manner in which a will shall be made, provides, 'that no devise so made, or any clause thereof, shall be revokable but by the testator's or testatrix's destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing, made as aforesaid.'

"None of these acts were done, and *we can not, under any circumstances, substitute the intention to do the act for the act itself.* Construction is admissible only where there is ambiguity; and there is no ambiguity in the provision referred to. *To substitute the intention to do the act, instead of the act itself*, without which the statute expressly declares the will shall not be revocable, *would be changing the law, not expounding it.*"

In Sewell *vs.* Slingluff, 57 Md. 537 (1881), Ella Slingluff, a married woman having no children, executed a will leav-

ing all her estate to her mother. Subsequently she bore two children, one of whom survived her, as did also her husband and mother.

Proof of alleged declarations of the testatrix that she did not wish her will to operate in the event of her leaving issue surviving, was offered. The Court of Appeals ruled this inadmissible, saying (pp. 548–9):

> "Wills are more especially guarded and protected by the law than any other instruments. They are guarded in their inception by the formalities required by our statute, and after they are made they are equally guarded by our statute, which points out the only mode by which they can be revoked or annulled.
>
> "This will may be treated as intending to pass real estate, and the mode of its revocation is pointed out in Sec. 302 of Art. 93 of the Code, which provides that no such will shall be revoked except by some other will, or by burning, canceling, tearing, or obliterating the same by the testator himself, or by some other person in his presence, and by his direction and consent. This statute is imperative in its terms, and no mere verbal declarations of a testator, however strongly expressed, and however earnestly he may wish or intend so to do, can have any effect upon a will after its execution. It can only be revoked in the manner prescribed by the statute. Wittman and Wife et al. *vs.* Goodhand, Admx., 26 Md. 95.
>
> "To allow the parol declarations of the testatrix, whether made before, after, or at the time of the execution of the will, to render that will inoperative at some future time, and in the event of some future contingency, would be nothing more or less than to allow a parol revocation of it. It makes no difference, that we can see, whether such revocation is called a revocation or by some other name. To revoke or to render inoperative are synonymous terms, and to allow the evidence for the latter purpose is to allow it for the former. The practical effect is precisely the same."

After discussing certain authorities, the court adds (p. 554):

> "These cases go, perhaps, as far as any cited in allowing parol evidence. But in these and in all the other cases referred to the courts have restricted the evidence to the ascertainment of the *animus-testandi*, and have never gone beyond that. Even if we were to admit that these cases were well decided (which we do not determine), we consider the parol evidence offered in this case inadmissible. If it were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong case, and one with many equitable features strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the Act of 29th Charles II, no court has permitted such testimony to be received, we cannot do so now."

In Wittman *vs.* Goodhand, 26 Md. 95 (1866), it was contended that the—

> "will was fraudulently kept concealed by the appellee, after the testator had directed her to destroy it, and that he died in the belief that it had been destroyed" (pp, 105–6).

It was attempted to support this by testimony to the effect that the testator had said, in 1886, four years after the date of the will "he had concluded to die without a will." "That the State of Maryland would make a good enough will for him;" and that "he wanted to make no difference between his children." In 1864 or 1865, two or three years after the date of the will he had "expressed his determination to die without a will, and that he wished to make no distinction in the distribution of his estate between his children" (pp. 98, 99).

Bartol, J., in delivering the opinion of the court, says (p. 106):

> "As to the declarations of the testator, it is clear

> that they could not amount to a revocation of the will, which, under the Code, Art. 93, Sec. 303, could not be effected except by writing."

In Allen *vs.* Huff, 1 Yerger, 404 (1830), "the heirs relied upon a parol revocation" of the will propounded. The will was proved by subscribing witnesses in due form, and contestants then gave in evidence declarations of the testator made subsequent to the date of the will, to the effect that his will "should not stand;" that the law made as good a will as any; that he once made a will but had broken it; that he wished to make another will, and the like. The will disposed of both real and personal property.

The court below charged the jury that such a will could not be revoked by parol either as to realty or personalty.

Mr. Justice Catron, then a member of the Supreme Court of Tennessee, in affirming the judgment of the court below, says, (p. 406):

> "Could this will be revoked by parol? If so, the circuit court erred in rejecting the evidence from the jury. To decide this question the court is called upon, perhaps for the first time since its existence, to give a construction of the Statute of Descents of 1784, Ch. 22. The 14th sec. declares, 'that no written will shall be revoked or altered by a subsequent nuncupative will except the same be, in the lifetime of the testator, reduced to writing and read over to him and approved, and unless the same be proved to have been so done by the oaths of two witnesses at least, who shall be such as are admissible upon trial at common law.'
>
> "Former adjudications of North Carolina and Tennessee have declared this section as applicable alone to a bequest of goods and chattels by a former will. No. C. L. R. 91. Peck's R. 306. So we will take it. This will could have been revoked in part directly or by implication. Greer *vs.* M'Cracken, Peck's R. 301. First, then, as to the personalty; was parol proof admissible to prove it revoked? The statute says not. To make the nuncupative revoca-

> tion effectual it must have been reduced to writing in the testator's lifetime and read over to him and approved by him. The facts that the paper was read to the testator and approved by him must be proven by two competent witnesses. It need not be subscribed by the testator or the witnesses, yet the writing alone can be received to contradict the written will. In a case so delicate as memory of what a testator casually said, where perversion and perjury are so much to be dreaded the legislature wisely guarded against such mistakes by requiring a writing and rejecting all inferior proof of revocation. So far then as personal property was devised by the testator the charge of the circuit court was correct."

The court then discusses the revocation of wills of real estate and reaches the conclusion (p. 409) that "The evidence of revocation must be of dignity equal to the instrument revoked."

Speaking of the evils which would result if parol revocations were permitted, the court says (p. 408):

> "The testator, aged and garrulous, the sick and fretful, the literally dying from ill temper, or imposition by the interested, makes a hasty expression; by an intemperate word, revokes his will, cuts off his wife, and sets up collaterals; a momentary flush of feeling not thought of the next hour, sets at naught the testator's most solemn act. If revocations can be thus made and thus proven, the aged, the sick and peevish had better not make wills more likely to destroy their estates by litigation than preserve them to their devisees."

In Ladd's Will, 60 Wis. 187 (1884), a will valid in every respect was found after the testatrix's death in 1882. It was written on one side of a double sheet of paper and dated in 1870. On the back of the blank sheet was written, in testatrix's handwriting, in pencil: "I revoke this will," with date in 1879 and signature. It was proved by witnesses

that testatrix had often declared her intention of revoking her will.

Cassoday, J. (author of the work on Wills), in an exhaustive opinion, held the written words did not constitute a revocation. Speaking of the declarations he says (p. 199):

> "It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn and without the privilege of cross-examination. Jackson *vs.* Kniffen, 2 Johns. 31; Waterman *vs.* Whitney, 11 N. Y. 157; Staines *vs.* Stewart, 8 Jur. (N. S.) 440; Boylan *vs.* Meeker, 28 N. J. L. 274; Hargroves *vs.* Redd, 43 Ga. 142; Runkle *vs.* Gates, 11 Ind. 95. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well written and able opinion of Judge Dyer in Southworth *vs.* Adams, 11 Biss. 256."

In Perjue *vs.* Perjue, 4 Iowa, 520 (1857), R. Perjue, who died in August, 1855, left a will dated February, 1851, giving his entire estate to his wife, with certain limitations over. The execution of the will was proved as well as the competency of the testator, etc. It was also proved that a few days prior to his death testator, in the presence of several people, declared that he "wanted his affairs arranged as follows" (naming certain dispositions of various pieces of property), and at the same time he referred to his written will, said it was "of no force" and "not to his notion."

On this state of facts Wright, C. J., held no revocation had taken place, saying (p. 522), that these circumstances "can in no way or manner affect the validity of this will."

In Crocker *vs.* Chase, 57 Vt. 413 (1885), Powers, J., says (p. 419):

> "It is settled on authority that such subsequent declarations cannot be received to establish any fact embodied in the declarations. Wills in writing cannot be impeached by parol statement any more than other written instruments. They cannot be revoked except in the manner pointed out in the statute."

At the trial of this issue the caveators made no attempt to show by any affirmative evidence that Judge Holt himself or any one by his authority did any of the acts of mutilation appearing on this will. Indeed any such evidence would have been fatal to their contention that it was a forgery. Unless therefore by some competent evidence in this Record Judge Holt can be connected with the acts of burning, tearing and the like which were done to this will, it must be treated as though such acts had never been done. In the absence of any affirmative evidence tending to connect him with the acts of mutilation, we are brought to the inquiry whether the evidence raises any presumption that Judge Holt either tore or burned, or authorized another to tear or burn this will. It is submitted that it does not.

The Presumption is that the Mutilation was Neither Done nor Authorized by Judge Holt.

Both the courts below, as heretofore shown, were greatly embarrassed in the consideration of every branch of this case by the peculiar and, as they were then regarded, unprecedented circumstances of the anonymous appearance of this mutilated paper, and avoided a definite decision as to the presumptions arising therefrom.

The trial justice, in ruling upon one of the objections in the course of the trial, at the beginning of the caveators' testimony had occasion to consider this subject and arrived at the conclusion that there was no presumption either that

Judge Holt did or did not mutilate the instrument, saying (Rec., p. 33):

> "There can be no presumption that some third person mutilated it, and I think there can be no presumption that it was mutilated by the testator.
>
> "Certainly, unless it appears that this will came from some other source than from someone who had picked up the testator's papers, if it does not appear that it came from the custody of someone who would have some interest in mutilating it, it does not appear to me that there can be any possible presumption that it was mutilated by some third party.
>
> "In the absence of presumption either way, where are we left?"

And again in his charge to the jury, he says (Rec., p. 133):

> "There is, therefore, no presumption arising out of the fact itself that the paper has been mutilated, burned, or torn that it was the act of Joseph Holt; but you are to take these circumstances in connection with all the evidence and strive to reach a conclusion."

The Court of Appeals, however, in determining this branch of the case went further, saying that if the paper had been found in its present condition in the repositories of the testator a presumption of revocation would at once attach, adding (Rec., p. 154):

> "Coming to light at the time and in the manner in which this paper did, *we are not sure* but that the same presumption of revocation ought to be indulged.
>
> "Certainly, it would be more just and more consistent with the reasons for the ordinary presumptions of law, to presume that the paper had remained under the control of the testator and had been spoliated by him, as he had the lawful right to do, rather than by a stranger, who, in suppressing or defacing the will of another, commits a heinous offense."

It is freely admitted that, had the paper in the condition

in which it was produced at the trial been found in the repositories of the deceased, a presumption would have arisen in favor of its revocation. It may also be conceded, for the purposes of argument that, had the paper in this condition come to light in the hands of some disinterested third party, the question might have been open and no presumption either way would have attached. The absence of any presumption can not, however, aid the caveators, who have the burden of showing that the condition of the paper is the result of an act by Judge Holt.

But it is submitted that the court in determining what presumption attaches to this paper can not stop with the consideration of its condition and manner of appearance, but must go further and consider all the circumstances in evidence which tend to throw any light upon its present condition. This both the courts below failed to do, and hence proceeded their error.

The only evidence in this Record bearing directly upon the history of the paper propounded, in addition to the evidence as to handwriting of the testator and of the subscribing witnesses, tending to show it to have been at some time a valid, subsisting will, and that tending to show that Judge Holt and the three witnesses were together at the time it purports to have been executed, is, that during the evening of August 24th, 1894, an official of the United States Post Office at the main Post Office in this city, marked the envelope containing it with a stamp indicating that it had been collected by a carrier from a public mailing box in the most populous part of this city—the northwest section; that it lay over Sunday in the Post Office and was delivered by the carrier when making the first mail delivery the following Monday morning to its addressee, the Register of Wills of the District of Columbia, that official being then the only lawful custodian of the document (so constituted by Maryland act of 1798, Ch. 101, Subch. 2, Secs. 2 and 3), in

whose possession it has ever since remained (Rec., pp. 21, 48, 119).

While the above is all the evidence bearing directly upon the history of this paper, one other fact—a most important, extraordinary, and, it is submitted in this connection, all-controlling fact—which was wholly ignored by both the courts below, was brought out after the caveatees had closed their case, upon the examination of the assistant of the Register of Wills (Rec., p. 48), viz., the fact that two of the caveators, Washington Holt and Sterett, who, in the event of Judge Holt's death intestate, would together, with Sterett's sister, Mrs. Bowmer, have succeeded to two-thirds of the estate, and would, to that extent, have benefitted by the suppression or destruction of the paper in controversy, took possession of all Judge Holt's effects, ransacked his papers in secret, selected therefrom such as for any reason they did not wish should be preserved to be seen by other eyes than theirs, and burned them.

While conceding all the force that can possibly be claimed for the presumption of innocence, that presumption can not be applied to an act in itself unlawful, as this was, and counsel are yet mindful, and in this connection most earnestly urge upon the court the application of a maxim of law as old as that presumption, "*In odium spoliatoris, omnia praesumuntur.*"

No person other than these two caveators, and the servant Strothers who assisted them in the unlawful destruction of some of the deceased's effects, and who, from that time to the time of the trial was supported and housed by them, could possibly have any knowledge of what papers were burned and suppressed. They give an account of what these papers were (Rec., p. 80) and claim that nothing of a testamentary nature was among them.

But these parties, before administration granted and without color of right destroyed some of Judge Holt's papers. In doing this they were guilty of an unlawful act and must

be held responsible for the consequences of such unlawful act, and one of the consequences of this act is that the presumption arises that they destroyed and intended to destroy something they had some motive in suppressing. In considering the question of what presumption arises upon all the circumstances of this case, as to who burned and mutilated this paper, is the court bound to accept as final or even sufficient the unsupported account given by the wrongdoers of such improper and unjustifiable conduct?

When the master of a merchant vessel in time of war is shown to have spoliated his ships-papers before the boarding of his vessel by naval officers of one of the belligerent powers, no inquiry is made as to what papers he destroyed, but the presumption immediately attaches that the papers destroyed were of a damaging character, and the vessel is seized and carried into port to be adjudicated as prize. Unless the explanation be prompt, frank and satisfactory, condemnation will follow and in the words of Chancellor Kent (1 Comm. *158) when spoliation is shown "a case that escapes with such a brand upon it is saved so as by fire."

The Pizarro, 2 Wheat., 227.

This principle was applied in the leading case of Armory *vs.* Delamirie, 1 Strange, 504 (1722), where, in an action to recover the value of a jewel unlawfully removed from its setting, it was held that the law "should presume the strongest against" the wrongdoer, and that he was consequently liable for the value of the finest stone that could be fitted into the setting. In Hare & Wallace's notes to this case (1 Smith's L. C., 8th Am. Ed., pp. 688–690) are collected the authorities on this subject, which may be summed up in the lines from Leading Cases Done Into English (Lond., 1876):

> "For what man hideth truth in wrong doing,
> "Against him the law deemeth everything."

Quoted, Lawson on Presumptive Evid. 184, note.

This principle has also been applied to cases like the one

at bar, where parties to whose interest it was to suppress testamentary papers of a deceased, first took possession of a testator's effects and were guilty of improper and suspicious conduct.

Such a case was Podmore *vs.* Whatton, 3 Swabey & Tristram, 449 (1864). The testatrix, Miss Whatton, died, leaving her brother as only next of kin, who, immediately upon her death, took out letters of administration upon her estate. Podmore, the plaintiff, sought to probate the draft of a will executed by the deceased some six years prior to her death, the original not being forthcoming. The execution of this will was proved and its identity with the draft established. It was shown that the deceased, after executing the will, took it with her and placed it with other valuable papers in a certain black box in her room, and it was in evidence that on a subsequent occasion the deceased had stated that her will was in that box.

The defendant, the brother of the deceased, came to the house a few days prior to her death, obtained possession of the key to this box and searched for a will. He was seen with a paper in his hands which he declared was a will, and he said that as he was the nearest relative of the deceased everything ought to go to him.

Sir J. P. Wilde, in the course of his opinion says (451):

> "The will having been thus made, the next and most important question is, what became of it? On the part of the plaintiff it was urged that this was an inquiry upon which the court was not bound to enter; that the will once made, could only be revoked by the specific methods indicated in the Wills Act, and that, unless the defendant established its revocation, the court was bound to pronounce it unrevoked and admit it to probate. On the part of the defendant it was argued that as the will itself was not forthcoming, and had been last seen in the custody of the testatrix, the law must presume that she herself revoked it.
>
> "The court cannot accede to either of these views.

A material question of fact has to be decided in this case before any presumption arises on either side; and it is this—was the will found at the decease of the testatrix or not? If it was found at her death and in an unmutilated state then she did not revoke it. If it was not so found, then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty. For the depositories of the deceased are duly searched *by those whose good faith is not impugned*, and who vouch for the fact one way or another. But in the present case it is far otherwise. A large body of evidence has been produced tending directly to question the fair dealing of the defendant, who had sole access to his sister's papers, and the charge of suppressing this will was but thinly veiled, though faintly pressed against him."

After reviewing the evidence substantially as above, he continues (p. 455):

"All this evidence leaves a clear result on my mind. I am satisfied this will was in the box of the deceased when she died, and, as the keys of that box were at once handed to the defendant, I am also clear that the will passed to his hands. Whether he destroyed it or whether he has it now, or where it is or what has become of it—these are needless questions; for, if he as spoliator has suppressed it, I cannot doubt that the plaintiff is entitled to probate of the draft until the original will appears. It was strongly pressed at the trial that the court should be cautious almost to timidity in basing its decision upon the ground of the defendant's guilt and the door was held open to the safe refuge of 'not proven.' But *it is well to bear in mind that there are two parties to the suit, and that undue tenderness to one is denial of justice to the other.*"

In Finch *vs.* Finch, L. R. 1 P. D. 371 (1867), a lost will was propounded for probate. It was proved that the testa-

tor executed a will, and that it was last known to have been in his possession, but after his death was not forthcoming. Declarations of the testator were admitted to the effect that he had made a will leaving all his estate to his daughter, the plaintiff, and that he was displeased with his son, the defendant. There was also evidence tending to show that the deceased had stated his will was in a certain drawer.

On the day the testator died his son went alone into the room where the will was supposed to be, and was seen coming out acting as if concealing something. Later he informed his sister that he must administer on the estate, and on being advised by her that there was a will, he told her to hunt for it. They went together to the place where the will was supposed to be, and he produced the key to the drawer from a place other than that in which it had usually been kept.

Sir J. P. Wilde, in delivering judgment, says (p. 372):

> "This case must be decided upon the same principle as that upon which the court proceeded in Podmore *vs.* Whatton, 3 Sw. & Tr. 449. There is no doubt that if a man dies, after duly executing a will and at the time of his death his will having remained in his custody is not in existence, the law presumes that it was revoked. But, in all such cases, the question to be determined is whether the will was or was not in existence at the time of the death."

He then quotes from Podmore *vs.* Whatton (*supra*) to the effect that this question is generally of ready solution by reason of the repositories of the deceased being usually searched by persons whose good faith is not impugned, and continues (p. 373):

> "But that difficulty does present itself in the present case, for the depositories of the deceased *before they could be reached by any independent person*, were clearly accessible to and are proved in evidence to have been investigated by the only person who was inter-

> ested in destroying the will, if it existed—namely the defendant. The question is whether the circumstance that the will could not be found after the defendant had access to and had searched the depositories ought to satisfy the court that it was not in existence when the testator died."

He holds this circumstance not to be satisfactory and pronounces for the will.

In Haleyburton *vs.* Kershaw, 3 Desau. (S. C.), 105 (1810), the complainant, the heir at law of one White, filed a bill against White's administrators to get the benefit of a contract made by White with a builder to construct a house, which contract they had canceled and destroyed. Desaussure, Chancellor, after stating the contract had been proved and admitted by the administrators, says (p. 112):

> "No presumption seems wanting. If it had, the court would have been inclined to have made them in favor of a complainant who has been deprived of the benefit of the written contract by the act of the defendants. The court will go very far in presuming against those who destroy papers and instruments necessary to the security or elucidation of the rights of others, *in odium spoliatoris*, as it is expressed. I do not apply that phrase to these defendants; they are good men who acted unadvisedly, and not wilfully wrong; but the effects of that error are the same to the complainant. And he would be entitled to the benefit of all the presumptions which could reasonably be raised out of the circumstances for his benefit."

Directly in point, not only by reason of the decision of this precise question, but also by reason of the similarity, it may almost be said, identity of its facts, is the case of Hitchings *vs.* Wood, 2 Moore P. C. 353, 2 Curt. 82, cited and fully discussed (*supra*, pp. 34–49). In that case it will be remembered a burned and mutilated testamentary paper came anonymously through the mails. In the course of the

trial, as in the trial of the case at bar, it unexpectedly developed that the persons most interested in the supression of the document, who had been in possession of the testator's effects from the moment of his death, had unlawfully burned some of his papers.

It was objected that this paper could not be propounded for the reason that it was a cancelled document. But in disposing of this contention Sir Herbert Jenner says (2 Curt., 114):

> "The court was of opinion that the cancelation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have been saved out of many burnt by parties the writer could hang; and therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper."

And the Privy Council when asked to hold that this paper had been revoked, said (2 Moore P. C. C. 447–448):

> "We, think, if this be a genuine instrument, that the onus to make out the fact of the cancelation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom and under what circumstances does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. . . . It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practiced, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator."

In the decision of all these cases the courts invoked no new and untried rules of law because of their novel circum-

stances, but applied the principles laid down by our oldest text writer on the law of wills,

Swinburne on Testaments and Last Wills (6th Ed. p. 538):

"What if the testament be found cancelled and defaced, but it is not known who did it? To whom is this act of cancelling or defacing the testament to be attributed? To the testator which made it, or to some other, which otherwise peradventure might be hindered by it?

"It seemeth not to be reputed the act of the testator; for mutation or change of the mind is not to be presumed; especially after a man hath done a thing with such deliberation and resolution wherewith testaments commonly are made and finished.

"On the contrary, it seemeth that it ought not to be accounted the act of any other; for that were to presume fraud and deceit in men; which ought not to presumed, unless it be proved.

"In this controversy, therefore, I suppose that the person in whose custody the testament is found so cancelled or defaced is to be adjudged to have done the act, whether it be the testator or another.

"And if it be so that the testament were kept in such a place, as not only the testator, but others might have access unto it; in this case the arguments and circumstances of the fact being equal and indifferent, the cancelling or defacing of the testament is rather to be ascribed to the testator than to others; who is also presumed to have done the same wittingly and willingly; saving in Legacies of Freedom, or *ad pias causas;* which being blotted or put forth by the testator, it is not presumed to have been done willingly. *But when the argument and circumstances be unequal, and the greater presumptions that it should be the act of another rather than of the testator, it is to be adjudged accordingly; for the fewer and weaker presumptions give place to the more and stronger.*"

The trial justice when he first expressed himself upon the

subject of the presumption, if any, to be attached to this paper (Rec., p. 33), had before him only the evidence of the manner of its appearance and the marks of mutilation borne upon its face. He seems to have been unduly influenced by the erroneous belief that this was an entirely novel and unprecedented case. When later in the trial it was shown that Washington Holt and Sterett had been guilty of unlawfully destroying some of the testator's papers, (Rec., pp. 48, 80, 81, 87,) the court failed entirely to connect this highly important circumstance with the facts which it had before it when the original ruling was made, and in charging the jury adhered to its first position.

It is not, however, necessary to indulge in the presumption that the caveators either wittingly or unwittingly mutilated this paper. The caveatees are not driven to the necessity of choosing between them and Judge Holt. It is a matter of no possible consequence who tore and burned this paper if it was not done by Judge Holt or some one acting under his orders.

The only persons in the world who knew what papers were in possession of Judge Holt at the time of his death are Sterett and Washington Holt. They testify as witnesses for themselves and the other caveators and swear positively that this paper was not in any of Judge Holt's repositories at that time.

By this testimony, whether true or false, the caveators are bound, and they can not therefore invoke any presumption from Judge Holt's supposed possession of the paper as they have, for their purposes, conclusively shown it not to have been in his possession at the time of his death.

Judge Holt's habit of preserving papers, of burning nothing himself and not permitting others to burn anything, coupled with his preservation for forty-six years of his will of 1848, and the manner in which he indicated the revocation of that paper (Rec., p. 167), while not of controlling importance, are yet significant and certainly do not tend to

raise a presumption that he tore and burned this paper.

If this case were, as was supposed by the courts below, wholly unprecedented, it is submitted that no presumption that Judge Holt mutilated this paper can arise from the mere failure to show who did mutilate it. On the contrary, those who set up the revocation must affirmatively show that *he* did it.

But if a precedent be required, it is submitted that the case of Hitchings *vs.* Wood, in the Privy Council, presents a closer analogy than is usually found in decided cases. The amount there involved, more than ten times the amount in this case, the distinguished counsel engaged in its presentation and the able jurists who considered and decided it make it a safe guide to the decision of this case and it must follow that there is therefore no presumption that Judge Holt mutilated this paper.

No Evidence of Revocation and the Court Should Have so Instructed the Jury.

As before stated, in dealing with the question of revocation the original genuineness of the will must be assumed. Who therefore charges its revocation must prove that fact. This proposition was never disputed in the case and on the trial the court expressly imposed the burden of proof under this issue upon the caveators. How they discharged that burden will now be considered.

All of the evidence, notwithstanding the antagonistic character of the two issues offered by the caveators, was with a single exception offered and admitted upon both the issues tried in the case—forgery as well as revocation. The paper came into court burned and mutilated. During the whole progress of the trial not one scintilla of evidence was produced to connect Judge Holt with the paper in controversy, except that produced on behalf of the caveatees, tending to show that it was a genuine document and at one time his valid, subsisting will. All the energies of the caveators on

the contrary were limited to proving that it was a forgery, and had never been seen by Judge Holt. There is no evidence in the Record that any person burned or destroyed any paper, except the evidence proving that Washington Holt, Sterett, and Strothers burned some of Judge Holt's papers after his death, (Rec., pp. 48, 80, 87) and that during his lifetime Strothers burned a spoiled check (Rec., p. 87). There is therefore no evidence tending in the remotest degree to show that Judge Holt tore or burned *this paper*, nor tending to show that any other person did by his direction.

Allowing to all the evidence in the Record on behalf of the caveators upon this issue its utmost probative force, the most that can be claimed for it is that it tends to show that long after the date of the will Judge Holt entertained testamentary intentions different from the provisions of that paper, and that he had expressed himself as though he had made a will in favor of other persons than the beneficiaries named in the paper in controversy. No such will, however, was produced and no evidence was offered tending to show the execution of any such will nor was any attempt made to establish such a one as a lost will.

In dealing with this question of revocation the counsel for the caveators and the learned justice who presided at the trial lost sight of the fact that the evidence absolutely failed to connect Judge Holt in the slightest degree with the doing of any revocatory act to the paper in question. It was apparently assumed that the condition of the paper and its manner of appearance answered the purposes of such proof. The position of the trial justice in this regard, therefore, is entirely inconsistent with his conclusions above pointed out, that no presumption as to revocation attached to this paper. In other words, the caveators offered and the court, over objection and exception, admitted evidence of acts and declarations of the testator to show his intent in doing an act which they never proved that he did.

and which all the evidence offered by the caveators expressly negatived the possibility of his ever having done or been able to do.

It has already been shown in the statement at the head of this brief that evidence as to all of Judge Holt's life and his relations with his next of kin, the beneficiaries under the will and persons more or less remotely connected by affinity or consanguinity with any of them was admitted, and submitted to the jury upon both the issues in the case.

While not undertaking to review in detail this evidence it is deemed proper to call special attention to the evidence covered by the third assignment of error as an illustration of the extent to which the caveators pushed their claims to the admission of incompetent testimony and the indulgence in that regard accorded to them by the court.

In the cross-examination of the witness, Mrs. Ray (Rec., pp. 94–95), who is a niece of Miss Hynes, one of the beneficiaries under the will, evidence was admitted for the purpose of showing that her husband, Nick Ray, in October, 1884, became indebted to the testator and subsequently failed to discharge his obligation. Mrs. Ray was shown a paper, purporting to be a copy of a letter written by Judge Holt in 1886 to her husband, and though the witness testified on such cross-examination that she had never seen the original and did not know that her husband had ever received it, this paper accusing the witness' husband of "a deliberate breach of faith," was admitted in evidence over objection and exception—

> "upon the question whether or not under all the circumstances, the testator would have allowed such a will as that in controversy to stand under the *possibility* that some portion of the property which would pass thereunder *might ultimately* go to the said Nicholas Ray" (Rec., p. 95).

Nothing could be more palpably irrelevant to the question whether Judge Holt had revoked the will than this

letter in 1886 to Nicholas Ray, who was not in the remotest degree connected with the will and had not been examined as a witness in the case.

By the action of the court in admitting this letter in evidence, upon the grounds stated, the jury were in effect advised that they might find that Holt had recalled his bounty to Miss Throckmorton, if they believed he had subsequently conceived a dislike for an individual, not related to her, nor even connected with her by marriage, and of whose existence she was unconscious.

The obvious effect of this letter was to create an atmosphere of hostility towards one of the caveatees' witnesses which might, by inflaming the passions or prejudices of the jury, result in an adverse verdict.

Even if evidence of a revocatory intent on the part of Judge Holt had been admissible in this case, there could have been no warrant or excuse for the admission of anything so remote and irrelevant as this letter, and had the jury found for the caveators on this issue the judgment must have been reversed for the admission of this evidence alone.

All the testimony covered by the exceptions under the assignment of errors upon this issue will be found on examination to fall into two general classes:

1st. Alleged acts and declarations of Judge Holt, at various times subsequent to the date of the will, tending to show a change in his relations with and affections for the caveators and others of his relatives, on the one hand, and towards certain relatives of the beneficiaries under the will on the other.

2d. Alleged declarations of Judge Holt, claimed to have been made at times long subsequent to the date of the will, tending to show that he had probably made or intended to make a will differing in some of its provisions from that propounded.

If there were a presumption that the paper in controversy was revoked, as arises in the case of a mutilated will found

in the repositories of the testator at his death, every species of evidence tending to show the intent with which the presumed revocatory act was perpetrated would be competent to aid and support that presumption. Were that the case here, much, perhaps most of this evidence, would have been admissible. But in the absence of a presumtion in favor of revocation it can in no event become material to show a revocatory intent until a foundation has been laid by proving the doing of some revocatory act, for the evidence of intention is only competent for the purpose of explaining the reason for which an act is done. In what has gone before, it has been shown that the presumption attaching to the will in controversy is that it was burned and mutilated by some one other than Judge Holt, and, it must therefore be considered, until some evidence is produced that he or some one by his direction so mutilated it, as if it were entirely without any mutilation. But even in the view adopted by the trial justice that there was no presumption either in favor of or against the revocation of the instrument, it is inconceivable how evidence of the intent with which Judge Holt *might have* mutilated the paper could be received until it was proved that he had done the act resulting in mutilation. Under such circumstances, evidence of an intent to revoke a will is as immaterial to the issue under discussion, as in a murder trial would be evidence of a murderous intent when the defendant was shown not to have been within a thousand miles of the scene of the homicide. One cannot at present—though it is impossible to forsee what developments in this regard the 20th century may bring forth—build a house in the air without its ever touching and resting on some foundation; neither, it is submitted, can one in a court of law prove the doing of an act by showing an intention or even a desire, however strong, to carry the act into effective execution.

It thus becomes, it is submitted, a matter of demonstration that there is not in this Record a particle of competent

evidence upon this issue of revocation. It was therefore the plain duty of the trial court to have so instructed the jury and to have withdrawn this issue as well as the issues of fraud and undue influence from their consideration. The third, fifth and sixth prayers of the caveatees, covered by exceptions Nos. 31, 32 and 33 (Rec., p. 122) under the fifth assignment of error, in legal effect requested the court to instruct the jury that there was no evidence of revocation and that they must find accordingly. These prayers should have been granted, and in refusing them the court committed error.

The twelfth and thirteenth prayers of the caveatees, covered by exceptions Nos. 34 and 35 (Rec., pp. 122, 123) under the fifth assignment of error in effect requested the court to instruct the jury that there was no evidence tending to show that Judge Holt had revoked the paper in controversy by the execution of a later, inconsistent will. In refusing these prayers the court below again committed error.

In granting the fourth prayer of the caveators covered by exception No. 25 (Rec., p. 120), under the fourth assignment of error, the trial court in effect instructed the jury that from the evidence before them tending to show a change in Judge Holt's feelings toward and relations with some of his next of kin, the beneficiaries named in the paper in controversy, and all persons nearly or remotely connected with any of them by affinity or consanguinity, they could find that the paper had been put in the condition in which it was produced, by Judge Holt or some other person under his direction. In other words, from the evidence of alleged inconsistent motives they were at liberty to find that he did a revocatory act. In granting this prayer it is clear that the court committed error.

The caveators seem to have attached special importance to the fact that this paper purporting to be "signed and sealed" by Joseph Holt did not when produced bear a seal.

In their seventh prayer, covered by exception No. 26 (Rec., p. 120) under the fourth assignment of error, they requested the court to instruct the jury that, if they should find that the paper was both signed and sealed by Judge Holt and he afterward removed or caused to be removed such seal *animo revocandi*, then they should find the fourth issue in the affirmative. This instruction is open to the same objection as the one last above referred to, viz., that the jury were permitted to find that Judge Holt did an act, to wit, the removal of the seal from this paper, if they thought he intended to revoke it, in the absence of any proof whatever that the will ever had a seal, or, if it had, who it was that removed it, and in granting this instruction the court again committed error.

It is finally submitted that there was no evidence competent to go to the jury on this issue of revocation and that the jury should have been so instructed. There remains, then, only the opinion of the Court of Appeals, on this branch of the case, to be considered under this issue.

The Opinion of the Court of Appeals on the Questions Arising Under the Issue of Revocation.

In considering the disposition made by the Court of Appeals of the exceptions taken to the rulings of the trial court upon the issue of revocation it is important to bear in mind the contention of the caveatees, who were the appellants in that court.

They contended that the acts and declarations of the testator, indicating his intentions or state of mind were inadmissible to prove revocation. With this contention the Court of Appeals agreed, saying (Rec., p. 154):

> "If the will had been found among the papers of the testator unmutilated, the evidence would clearly have been incompetent to prove revocation as an independent fact."

The caveatees admitted that if the mutilation of the

paper apparent on its face had been done or authorized by the testator, most of the testimony admitted would have been competent.

But they insisted that there was no affirmative evidence that the testator did or authorized the acts of mutilation and that no presumption that he did so could be indulged, because not found in his possession and because the circumstances of its appearence showed that it had been improperly dealt with since the testators' death.

The portion of the court's opinion on this branch of the case is quite brief and the essential propositions are embraced in the following quotations (Rec., p. 154):

> "It seems to us quite clear, both on principle and authority, that this evidence . . . was competent as tending to maintain the issue of revocation.
>
> "If the will had been found among the papers of the testator unmutilated, the evidence would clearly have been incompetent to prove revocation as an independent fact. If it had been there found in its present condition, the presumption of revocation would at once attach. Coming to light at the time and in the manner in which this paper did, we are not sure but that the same presumption of revocation ought to be indulged.
>
> . . . . . .
>
> "In consideration, then, of the condition of the will, and the manner in which its appearance was made . . . the state of mind of the testator, during the more than twenty years in which the will was subject to his unrestrained control . . . was a material circumstance to be considered by the jury in determining whether the mutilation was the result of an intent to revoke."

Whether, by these observations, the court intended to decide that, though not free from doubt, the condition of the paper and the manner of its appearance raised a presumption that Judge Holt mutilated it, or that, refraining

from a decision of that question, the evidence as to the intentions and state of mind of the testator during the time the will was subject to his control was competent affimative evidence, without the aid of any presumption, that Judge Holt mutilated the will, is by no means clear.

As the whole strain of the case on revocation falls on these propositions, this uncertainty in the position of the Court of Appeals is to be regretted.

But whichever view is intended, it is, with deference, respectfully insisted that not one of the eleven cases cited as sustaining its conclusions gives any semblance of support to either position. No one of the cases cited decides that facts such as are here disclosed raise a presumption that the mutilation was done by the testator; no one of them decides that the declarations of a testator can raise such a presumption. Declarations are admitted to *support* or *rebut* presumptions, not to *create* them.

No one of the cases cited decides that evidence of intention and opportunity to revoke is competent affirmative evidence of mutilation by the testator.

A review of the cases cited will amply justify these criticisms.

The first of these cases is Lawyer *vs.* Smith, 8 Mich. 411 (1860).

A will, dated in June, 1824, and made under an antenuptial agreement of November 28th, 1820 (p. 411) was offered for probate. It was torn in several pieces and was resisted on the ground of revocation. Some years before her death, but after the date of the will, testatrix was adjudged a lunatic and one Maynard was appointed her guardian. One of the appraisers appointed in the lunacy proceeding to make an inventory of her estate testified to the confusion in which her papers were kept. They were found—

> "scattered and mixed promiscuously with other things. No one place in particular for anything. In the

> middle of a chest, packed with bed clothes we found some money tied up" (p. 419).

Her effects were gathered up by the appraisers and others and delivered to the guardian, Maynard. Some of them, including a barrel of papers, were deposited in a wooden building near Maynard's store. The torn will was found in this barrel among a lot of waste papers, newspapers, pamphlets and some old letters *together with the ante-nuptial contract under which the will was made,* all being in the custody of her guardian (pp. 416, 417).

Here, then, was the clearest case of the finding of the mutilated will among the testatrix's papers and other effects —in her possession—and there was therefore a presumption that the mutilation was done by her, and the case, in principle, is not different from one in which a mutilated will is found in the most private repositories of a testator. The court, per Manning, J., held that the condition of the paper was evidence of violence—

> "but whether done by the testatrix or some other person, and, if done by her, whether accidentally or intentionally and for the purpose of revoking her will, were questions of fact to be determined by the jury. To aid them in arriving at a correct conclusion on these points, and not as separate and independent evidence of a revocation," (p. 424).

the declarations were therefore relevant and plainly admissible to support the presumption of revocation arising on the facts.

In Patterson *vs.* Hickey, 32 Ga., 156 (1861), a mutilated will was found in the *testator's bureau drawer.* In support of the presumption arising from this fact that the will was revoked, the caveators offered testimony tending to show that the testator entertained testamentary intentions different from those expressed in the will. The court below excluded this evidence, Lumpkin, C. J., for the Supreme Court, however, (p. 160) held this to have been error, and that this evi-

dence was admissible to support the legal presumption that the will had been revoked, (pp. 159, 160) and also as explaining the intent with which the mutilation was done (p. 160.)

In Burge *vs.* Hamilton, 72 Ga. 568 (1884), the question was whether a statement made by the testator to a scrivener of a codicil to his will, *at the time of its execution*, was admissible to show that ten pages of writing attached together formed his will, there being some confusion on account of an erroneous statement in that paper of the number of pages of which it consisted (p. 619). This evidence was plainly admissible to identify the paper and to explain the ambiguity apparent on its face, (p. 629), as well as being of the *res gestae*, and was so held (p. 634).

The Court of Appeals apparently only cites this case in support of Patterson *vs.* Hickey, for the opinion refers to page 625, which is wholly taken up with a quotation from that case.

In Collagan *vs.* Burns, 57 Me. 449 (1870), a will consisting of fragments pasted together was produced *from the repositories of the testator* and propounded. The presumption clearly was that the mutilation was done by the testator (p. 453). The questions were whether declarations of the testator *made when pasting the fragments together and reading from the paper when they had been so arranged*, to the effect that his mother in law had mutilated the will (pp. 457–458) and declarations made later that he had given the principal beneficiaries under this will all of his estate (p. 461) were admissible or not. The probate court held the will to have been revoked, but upon the trial the jury found that no revocation had taken place, and on appeal judgment on the verdict was directed by a divided court. Appleton, C. J., held that evidence of these declarations and acts was admissible to rebut the presumption of revocation arising upon the facts (pp. 458, 461) and that the first declarations were admissible as well, being of the *res gestæ* (p. 459).

In this opinion three of the justices concurred. Walton J. delivered a dissenting opinion, concurred in by three judges, holding the evidence inadmissible, while Dickerson J., the ninth member of the court, delivered a separate opinion also holding the evidence inadmissible.

The case of Collyer *vs.* Collyer, 110 N. Y. 481 (1888), was that of a lost will which it was claimed had been fraudulently destroyed. The court held that there was a presumption the will had been destroyed by the testatrix *animo revocandi*, (p. 486), resulting from the fact that it was shown to have been in her possession and could not be found after her death, and evidence of the declarations of the testatrix was considered as supporting and rebutting the presumption arising upon the facts of the case that the will had been destroyed by her.

This case came up on appeal from a judgment of a surrogate, and the court sat as judge, both of the law and the facts. It cannot, therefore, be regarded as an authority upon any question of evidence. Indeed, the Court of Appeals expressly denies any intention of ruling upon the evidence, saying (p. 487):

> "As the evidence on the part of the petitioner wholly failed to make out his case, he was not harmed by any of the evidence offered and received on behalf of the contestants to which he makes objections, and such objections need not, therefore, be considered."

In McDonald *vs.* McDonald, 142 Ind. 55 (1895), the presumption of destruction by the testator arose from the fact that the will was not forthcoming at the testator's death, and the declarations were admitted to rebut that admitted presumption (p. 83) and to show the contents of the lost will (pp. 83, 84).

This clearly appears, by reference to page 81 of the report, the portion cited by the Court of Appeals:

> "These declarations of the testator the court per-

> mitted this witness to give to the jury. Appellants at the time objected to them being admitted as evidence, upon the grounds that there was no issue upon mental incapacity, and, second, that they were not admissible for showing the contents of a lost or destroyed will, because there had been no evidence of the execution of any such will. But upon appellees stating to the court that there would be evidence of the execution of the alleged lost will, the objection was overruled. The contention of the learned counsel for appellants is, that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this State that the declarations of a testator made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud, or undue influence. Runkle *vs.* Gates, 11 Ind. 95; Hayes *vs.* West, 37 Ind. 21.
>
> "But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator."

In Miller *vs.* Phillips, 9 R. I. 141 (1869), there was no mutilation of the will but a presumption of revocation resulted from the admitted act of the testatrix, namely her marriage. It was held by the court that under the law of Rhode Island this presumption from marriage was not conclusive, but was rebuttable like other presumptions, Potter, J., for the court, saying (p. 144):

> "And the evidence that the testatrix spoke of her will, we think, was properly admitted. Although there was for a time a great conflict of authority on the question whether parol evidence could be admitted in order to rebut the presumption of revocation, we consider the weight of authority now to be strongly in favor of its admissibility."

In re Valentine's Will, 93 Wis. 45 (1896), the contents of

a lost will were propounded for probate, the will having been last known to be in the possession of the testatrix, and not being forthcoming upon her death. Cassody, C. J., held (p. 55) declarations of the testatrix that she had destroyed her will to be admissible as tending to prove—

> "that she died in the belief that she had left no will, and thus support the presumption of revocation arising from the fact that it was last known to be in her possession but could not be found upon her death."

In Pickens *vs.* Davis, 134 Mass. 252 (1883), the questions were (p. 253), first, whether cancelation of a will revoking a former will revives such former will as matter of law, or whether it becomes a question of intention to be gathered from the whole case, and second, if it be a question of intention, whether subsequent declarations of a testator are admissible to explain what his intention was. It was held (pp. 256, 257) that, whether the former will were revived or not, was a question of intention, and that declarations were admissible to show and explain such intention.

In the well-known case of Sugden *vs.* Lord St. Leonards, L. R. 1 Prob. Div. 154 (1876), the questions were, as stated by Sir J. Hannen in the court of first instance (p. 175):

> "First, what were the contents of the will, which it is admitted was duly executed and attested upon the 13th of January, 1870; and secondly, was that will revoked, was it destroyed by the testator *animo revocandi*."

and as stated by Cockburn, C. J., on appeal (p. 217):

> "In the first place, was the will destroyed by the testator *animo revocandi*, or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory so far as it goes, but not altogether complete, ought probate to be

> granted so far as the evidence which we have before us shews what were the contents."

It was proved that Lord St. Leonards had duly executed the will and it was known to have been in his possession five months before his death, but, on his death, was not forthcoming; the presumption that he had destroyed it arose from its non-production at his death. The trial court pronounced in favor of the propounders of this lost will (p. 206), and that judgment was affirmed on appeal.

It was held, that, on the state of facts in the case, the presumption arose that the will had "been destroyed by the testator for the purpose of revoking it" (p. 217); and that this presumption could be rebutted by parol evidence tending to show that up to the very time of his death his intentions remained the same as expressed in the will (p. 217). And it was also held that parol evidence was admissible to prove the contents of the lost will (p. 220), Cockburn, C. J., saying (p. 229):

> "I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove it contents."

In Gould *vs.* Lakes, L. R. 6 Prob. Div. 1 (1880), the last case cited by the Court of Appeals, the question was whether both of two sheets of paper or only one of them constituted the will of the testatrix. It appears by the statement of facts in the report (p. 2) that:

> "On the death of the deceased, her will was *found in her writing desk* in an envelope, which had been apparently thrice opened and resealed. *With the exception of the attestation clause, it was all in her own handwriting*, and contained in *two sheets* of old-fashioned note-paper, one within the other and *stitched together* book-wise."

Declarations of the testatrix tending to show that she con-

sidered both these papers as her will was admitted by Sir James Hannen on the supposed authority of Lord St. Leonard's case. The finding of these papers in the condition and place as found would certainly raise the presumption that the annexing of the papers was her act, and her declarations tended to support that presumption.

From the foregoing review of the cases cited by the Court of Appeals, it becomes a demonstration that no one of them supports either position, as above indicated, in the court's opinion, while the principles which they do decide were never questioned at any stage of this litigation.

Reference is made, by the Court of Appeals, to the gift of ten thousand dollars to Miss Hynes as "an independent provision for the remaining legatee, for whom his affection remained unabated" (Rec., p. 154).

Of course the force of this evidence if competent in the case for any purpose was wholly for the jury, but it is not impertinent to recall the fact, that of the nine caveators in this case, Washington Holt, and his family, are the only persons whom any evidence in the Record connects with any purpose of Judge Holt to be a sharer in his estate.

Is it not quite plausible, especially in view of the evidence of his letter and declarations respecting Miss Hynes, which is equally credible, that in giving to the family of Washington Holt over fifty-three thousand dollars, or more than one-third of the estate in controversy, he was liberally providing for them in his life time in lieu of any testamentary provision in their behalf, thereby avoiding any necessity for changing his existing will? And is not the reasonableness of this view increased by the failure to discover among the carefully preserved papers of Judge Holt any will in favor of this much beloved kinsman?

Had such a will been discovered Washington Holt would certainly not have destroyed it nor permitted Sterett or Strothers to do so while burning the other papers of Judge

Holt, which in his judgment so urgently required immediate destruction.

The contention of the caveators in the Court of Appeals and the straits to which they were driven is well illustrated by the following quotation from their brief:

> "He, therefore, who offers a will for probate asserts, not only that the testator made it originally, *but that it continued to be the purpose of his life ever afterwards* that that instrument should take effect at his death. Now, this is a mental condition."

To this amazing proposition is opposed the ruling in Cheese *vs.* Lovejoy, L. R. 2 Prob. Div. 253.

> "All the destroying in the world without intention will not revoke a will, nor *all the intention in the world without destroying; there must be the two.*"

and also the language of Boyle, C. J., in Gains *vs.* Gains, 2 A. K. Marsh, 191: "We can not *under any circumstances, substitute the intention to do the act for the act itself*," and the multitude of decisions, a few of which are cited *supra* (pp. 70–79), holding that mere intention to revoke is wholly ineffectual.

THE ISSUE OF FORGERY.

The Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Assignments of Errors.

Under this head will be considered the exceptions taken to the admission of evidence and to the instructions of the court with reference to the issue of forgery.

In the consideration of this branch of the case it is to be borne in mind that the caveatees who had the affirmative of this issue in their case in chief confined their offers of evidence to proof of handwriting and to the fact that all the parties interested under the will had no knowledge of it prior to its receipt by the Register of Wills (Rec., pp. 20–28).

In rebuttal of this the caveators insisted upon giving in evidence alleged declarations and acts of the testator, tending, as they claimed to show his state of mind, feelings and intentions with respect to certain of his next of kin and their connections and certain persons more or less remotely connected by affinity or consanguinity with the parties named in the will, the most, if not all of this evidence relating to a period of time from seven to twenty years after the date of the will.

All of this evidence was specifically offered upon both the issues of revocation and forgery, counsel for caveators in response to caveatees' objections saying (Rec., p. 32):

> "We are offering this both upon the question of the genuineness of the will and upon the question of revocation."

And again (Rec. p. 39):

> "We would like to have it understood that we offer it for both purposes—both on the question of forgery and on the question of revocation."

Though objected to as incompetent upon either issue (Rec., pp. 29, 31, 32, 39), it was admitted upon both.

Indeed, not only was this evidence offered and admitted for the purpose of proving the will to be a forgery, but the court, in effect, told the jury that all the evidence offered in the cause was competent for that purpose. In charging the jury the court said (Rec., p. 131):

> "That is to say, from the photograph that you have had of the character and attainments of Judge Holt by the evidence in this case, either by his own letters or by the oral evidence of witnesses, you may judge whether it is likely or not that Joseph Holt would have composed and written the paper in controversy. . . . You are also to consider the circumstance touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this

> will, up to the time of the date of this will, bearing directly upon this question, whether it would be likely that he would have made such a will at that time, and also the subsequent conduct of the testator towards his next of kin or heirs at law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood of his having made such disposition of his estate as is made by this paper in controversy.
>
> "If, upon the consideration of *all* of this evidence, you reach the conclusion that this paper is not established to your satisfaction as the genuine paper of Joseph Holt, your answer to this first issue should be 'No.'"

This part of the charge, excepted to by the 36th, 37th and 38th exceptions (Rec., pp. 141, 142), comprehended all the evidence in the cause, including that which had been offered and admitted to prove revocation, so that the jury was instructed that all the evidence which was admitted upon the one ground or the other, was proper for their consideration as tending to establish the claim of forgery.

The Court of Appeals took the same view here contended for as to the effect of this part of the charge, saying (Rec., p. 153):

> "We think it sufficiently appears from a paragraph of the general charge, taken in connection with the express purposes for which the evidence was offered, that it was intended to bear distinctly also upon the issue of execution."

Indeed, the only evidence in the case withdrawn from application to the issue of forgery was that relating to the controversy between Judge Holt and Nick Ray, which, by the eleventh instruction (Rec., p. 135), was confined to the issue of revocation.

It has already been shown that under the circumstances of this case none of the evidence objected to was competent upon that issue. Under the rules of evidence it was also in-

competent under this issue, while considered logically, its admission was less excusable.

By the admission of this evidence and its submission to the jury in the manner shown by the Record, the jury were in effect told that if the evidence of the alleged acts and declarations of the testator, in the later years of his life, showed a change in his state of mind so far inconsistent with the provisions of this will as to justify the belief that he intended to revoke it, they could, at their option find either that he revoked it or that he never in fact executed it.

Furthermore, the admission of such evidence, upon an issue of forgery, authorizes the jury to set aside the will unless the testator, by his public acts and declarations evinces the intentions expressed in his will. The enforcement of such a rule will at once put an end to the right of testators to privacy as to their testamentary acts and imposes upon them, as a condition to the validity of their wills, the obligation to make public proclamation of their intentions. It is submitted that this is a new and dangerous doctrine, not supported by authority, and one which this court should take this opportunity to suppress.

It is submitted that the better principle is that expressed by the Court of Appeals of Maryland through Le Grand, C. J., in Cramer *vs.* Crumbaugh, 3 Md. 499:

> "Experience not unfrequently informs those, who have encountered the trials and vicissitudes of a long life, that kindness is to be received not only at the hands of those who are our kindred in blood, and that such, by their conduct, may forfeit all claim upon their bounty. The observation of every sensible man must notify him, that a person may have very satisfactory, and, to himself and the world, justifiable reasons for disinheriting his kindred, but *which he would be unwilling to make matter of record.* From a becoming and praisworthy respect to the feelings of the living, *a testator is properly dispensed*

from the necessity of assigning the motives which govern him in the selection of the objects of his bounty."

This Class of Evidence Generally Inadmissible.

Before considering the question of the admissibility of declarations and acts of the testator as applicable to this issue, it is advisable to note the general rule established by the courts with respect to the admissibility of such evidence.

The principle upon which such declarations and acts are admitted and the purpose for which admitted have been frequently considered and discussed by the courts, and the conclusions reached are fairly harmonious.

It is unnecessary to refer to a large number of such cases but attention is invited to the following, in which the question has received most careful and philosophical examination and decision, and which, it is believed present the best exposition of the general rule.

The Court of Appeals of New York in the case of Waterman *vs.* Whitney, 11 N. Y. (1 Kernan) 157 (1854), had this question before it. Selden, J., delivering the opinion of the court says (*p. 160):

> "The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator made *after* the execution of the will.
>
> "The subject to which this question belongs is of very considerable interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the omission to distinguish with sufficient clearness, between the different objects for which the declarations of testators may be offered in evidence, in cases involving the validity of their wills. It will tend to elucidate the subject to consider it under the following classification of the purposes for which the evidence may be offered, viz.: 1. To show a revocation of a will ad-

mitted to have been once valid. 2. To impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or from some other cause, not involving his mental condition. 3. To show the mental incapacity of the testator, or that the will was procured by undue influence. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. They have, however, been considered in most of the cases without regard to it; and hence much of the apparent conflict among them will disappear, when the proper distinctions are taken.

"To show the state of the authorities, therefore, and what the differences really are between them, it is necessary to arrange the cases according to this arrangement of the objects for which the evidence is given. In referring, however, to those belonging to the first of these divisions, it is proper to premise, that the revocation of a valid will is a matter which, not only in England, but in this State, and in most if not all, the other States, is regulated by statute; and these statutes are substantially the same; those in this country being for the most part taken from the English Statute of Frauds. Most, if not all, these statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, &c., accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.

"Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the *animo* (*sic*) *revocandi*, in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other, and in general entirely accord with the view here presented."

He then summarizes the doctrine as to the admissibility

of declarations of the testator in the following language (*p. 162):

> "I consider these cases as establishing the doctrine that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gestæ*, and for the purpose of showing the intent of the act.
>
> . . . . . .
>
> "In regard to the second class of cases, viz., where the validity of a will is disputed on the ground of fraud, duress, mistake or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and and are strictly a part of the *res gestæ*."
>
> . . . . . .
>
> (*P 164): "These cases must, I think, be sufficient to establish the position, that declarations of a testator, made either *before* or *after* the execution of the will, are not competent evidence to impeach its validity, on the ground of fraud, duress, imposition or other like cause."

Finally he adds (*p. 165):

> "I have referred thus particularly to these numerous cases, in which the declarations of testators have been held *inadmissible* upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases on the subject. None of them have any application to cases in which the will is assailed on account of the insanity, or mental incapacity of the testator at the time the will was executed, or on the ground that the will was obtained by undue influence.
>
> "The difference is certainly very obvious between receiving the declarations of a testator to prove a

> distinct external fact, such as duress, or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter it is the most direct and appropriate species of evidence."

In Mooney *vs.* Olsen, 22 Kan. 69 (1879), a will was contested, the issues being mental incapacity and undue influence. Evidence of the declarations of the testatrix made some time prior to the date of the will were introduced. Speaking of such declarations, Mr. Justice Brewer, then a member of the Supreme Court of Kansas, delivering the opinion, says (p. 76):

> "Much of the testimony above referred to was properly admitted as part of the *res gestæ*,—as matter surrounding the execution of the will, and properly throwing light upon the mental condition of the testatrix, and the influences under which she was acting. So far as her prior statements are concerned, they were properly admitted, but under a different rule and not as part of the *res gestæ*. It is sometimes broadly stated that the declarations of a testator, whether prior or subsequent to the execution of the will, are inadmissible for the purpose of impeaching it. In a certain sense this is doubtless true. As a mere matter of impeaching the will they are hearsay and inadmissible. They are not like statements of an ancestor in derogation of title or limitation of estate, which being declarations against interest are admissible against the heir, for there is no adverse interest in a devisor against the will or the devisee. They are more like declarations of a grantor, after grant, in limitation of his grant and are strictly hearsay. Thus, if a testator after executing a will, should say that the will was forced from him or that it was executed against his will, and through undue influence, such statement of itself would be hearsay and inadmissible. Jackson *vs.* Kniffen, 2 Johns. 31; Stevens

vs. Van Cleve, 4 Wash. C. C. 265; Hayes *vs.* West, 37 Ind. 21."

He then quotes from 4 Wash. C. C. and continues:

"But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence."

In Shailer *vs.* Bumstead, 99 Mass. 112 (1868), Colt, J., after holding that the declarations of the testator were admissible to show mental condition, tersely states the principle thus (p. 120):

"*The truth or falsity of the statement is of no consequence.* As a narration it is not received as evidence of the facts stated. *It is only to be used as showing what manner of man he is who makes it.*"

In Marx *vs.* McGlynn, 88 N. Y., 357 (1882), diaries of testatrix were introduced to sustain the issue of undue influence.

Earl, J., speaking for the court, says (p. 374):

"I have thus far considered this question as if the diaries and letters introduced in evidence by the contestant were evidence of all the facts stated in them. It was held by the Surrogate and by the Supreme Court at General Term that they were not,

and we are of that opinion. They are in the nature of hearsay evidence, declarations of the deceased which are incompetent for the purpose of defeating or destroying the will, or any of its provisions. They are competent only as bearing upon the condition of the mind of the testatrix at the time of the execution of the will. Such memoranda or declarations, whether made before or after the execution of a will, are competent as bearing upon the testator's mental capacity. They are also competent as bearing upon the condition of the testator's mind, with reference to the objects of his bounty. They may be given in evidence for the purpose of showing his relations to the people around him, and to the persons named in his will as beneficiaries. They are, however, entitled to no weight in proving external acts either of fraud or undue influence."

In Griffith *vs.* Diffenderfer, 50 Maryland, 466 (1879), Robinson, J., for the Court of Appeals says (p. 480):

"The questions arising under the third exception are of considerable importance in the trial of testamentary cases, and not altogether free of difficulty. How far, and for what purposes, the *declarations* of *a testator* made *after* the execution of his will, may be offered in evidence, under *issues of fraud and undue influence*, the decisions are conflicting. We do not propose to examine the many cases in which the subject has been considered, for this has already been done in Waterman *vs.* Whitney, 1 Kernan, 168, and Boylan *vs.* Meeker, 4 Dutcher, 274, and other cases, and it is unnecessary for us to do more than state the conclusions we have reached.

"Where such declarations are made so remote as not to constitute a part of the *res gestæ*, they cannot be offered as independent evidence to prove the charge of fraud or to show the *external acts* of undue influence, or attempts to influence the testator to make a will in a particular direction.

"If offered for this purpose, they are inadmissible on two grounds: 1st. As mere hearsay evidence,

which, by reason of the death of the party whose statement is offered, can never be explained or contradicted by him. 2d. It is inconsistent with the Statute of Frauds to permit a will, executed with all the formalities required by the statute, to be impeached or its validity in any manner impaired by the parol declarations of the testator made after the execution of the will.

"But the question whether a will is the free and voluntary act of the testator, or the offspring of fraud, whereby his judgment was misled, or of influences operating upon him, in consequence of which his will was made subordinate to that of another, depends upon whether he had intelligence enough to detect the fraud, and strength of will enough to resist the influences brought to bear upon him.

"The character and degree of the fraud practiced and the influence exerted, involve therefore necessarily to some extent the physical and mental condition of the testator at the time of the execution of the will."

. . . . . .

(P. 481): "Any evidence, therefore, which tends to prove the precise mental condition of the testator, and to place him before the jury just as he was when the will was made, is admissible. And for this purpose the declarations of a testator may, in some cases, be the most satisfactory proof.

. . . . . .

"We are of opinion, therefore, that the declarations of the testatrix to Mary Whitman in November, 1876; 'that she had made a will,' 'that she was dissatisfied with it,' 'that she had been persuaded to make it,' 'that she was sorry she had not let the law make a will for her, as it had for her husband, so that the children would have shared alike,' 'that she had done great injustice to her other children and to her grandchildren,' naming them; 'and was troubled about it' and 'sometimes tempted to destroy it,' and other like declarations, were admissible *for the purpose of proving the mental condition of*

the testatrix at the time of the execution of the will and codicil, but for no other purpose."

In Gibson *vs.* Gibson, 24 Mo. 227 (1857), declarations of a testator made two or three years after the date of the will to the effect that "he had never made the will, that if he had signed it they had got him drunk and made him do it, for he had no recollection of it" were offered on the issue of undue influence.

Leonard, J., delivering the opinion of the court, says (p. 228):

> "Upon an issue of 'will or no will' the declarations of the alleged testator are offered in evidence—sometimes as part of the transaction—sometimes as verbal acts (as they have been called) indicating the mental condition of the testator—and at other times as a mere narrative of facts, entitled to credit as such on account of the relation of the speaker to the subject-matter. Whenever the declarations can be considered as falling within the first class of cases, they are of course admissible, upon the common doctrine of the *res gestae* and the only question then is, whether they are so connected with the main fact to be proved as to fall within the rule. They are also clearly admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections, and they are then received as external manifestations of his mental condition, and not as evidence of the truth of the facts he states. *For this purpose, and as a mere narrative of facts, we do not think they ought ever to be received,* and this seems to be the general doctrine of the authorities, although there are certainly conflicting decisions on the subject."

In Cawthorne *vs.* Haynes, 24 Mo. 236 (1857), declarations of the testator, made before and after the date of the will, were offered to the effect that certain legatees under the will "should never have any of his property," and that "he had no will."

Leonard, J., in the course of his opinion, says (p. 238):

"The declarations made after the date of the will were relied upon, we suppose, respectively, as direct and implied assertions that the party had never made a will, or that, if he had, it had since been revoked; and the case of Gibson *vs.* Gibson [24 Mo. 227], already referred to, settles that if relied on for this purpose, they are mere hearsay and wholly inadmissible."

. . . . . .

(P. 239) "We are clearly of opinion that the declared purpose of the testator that these children should not share his bounty, made before and repeated after the date of the will, wholly unsupported as it was by any evidence whatever of incapacity or undue influence, would not have justified the jury in point of law, in finding against the will. We do not mean to say merely that, under the circumstances, the evidence was insufficient, in point of fact, to produce conviction; but to declare, as a matter of law, that the declarations, alone and unsupported by other facts, did not furnish any legal evidence whatever of the testator's alleged incapacity, or of undue influence, and of course their exclusion furnishes no ground whatever for reversing the judgment."

In Thompson *vs.* Updegraff, 3 W. Va. 629 (1869), undue influence was sought to be established.

On the trial, the defendants, over objection and exception, proved that testator had stated that two of the devisees under the will did not wish him to give anything to one of his sons; this "evidence was offered for the purpose of proving the declarations of the devisees" (p. 632). Maxwell, J., held this error, and says (p. 637):

"The authorities fully sustain the position that such declarations are admissible in evidence for the purpose of showing the state, condition and operations of the mind of the testator, at the time of the execution of the will.

. . . . . .

"It was therefore proper that the evidence of the

declarations of the testator should go to the jury, to be given by the jury such weight as they might see proper, for the purpose of showing the state, condition and operation of the mind of the testator, but for no other purpose. This class of evidence is dangerous in its character and is to be received with great caution. The only legitimate purpose of this sort of evidence is to show a condition of mind in which its free agency may be easily overcome by the improper influences of those surrounding the testator, and to lay the foundation for the introduction of other and more direct testimony showing that such improper influences were in fact exerted. The declarations themselves are no evidence that improper influences were exerted.

"If the declarations of the testator had been proved for the purpose of showing the condition of his mind, such evidence would have been properly admitted. But the bill of exceptions expressly negatives this idea and certifies that the evidence was offered for the purpose of proving the declarations of the devisees, for which purpose, as before stated, it was clearly improper and should not have been admitted."

In Couch *vs.* Eastham, 27 W. Va. 796 (1886), on an issue of *devisavit vel non*, proponents offered to prove declarations of the testator before and after execution of the will that he intended to make and had made his children equal, the alleged will discriminating between them.

Johnson, President, held such evidence inadmissible, saying (p. 799):

"The question we are now considering is: Upon an issue of 'will or no will,' can the declarations of the testator made before and after the execution, so far removed therefrom as to form no part of the *res gestæ*, be admitted to prove that the will was executed by mistake?"

He then reviews the authorities and says (p. 804):

"If such declarations could be admitted to prove

that the will was procured by fraud or duress or mistake, no man's will would be safe. The temptation to disappointed seekers after the testator's bounty to watch the testator, and, as his mind grew weaker, to tamper with him and induce him to make declarations that were inconsistent with the will, would be sufficient to induce unscrupulous persons to do such miserable work and even to go farther and suborn witness to swear to imaginary declarations of the testator inconsistent with the terms of his will pretended to have been made both before and after the will was executed. The statute which requires the will to be in writing and properly witnessed, would afford but little protection to the testator or to the real objects of his bounty, if proof of such declarations could be admitted."

The conclusions reached in these cases will be found upon examination to be adopted by the text writers as presenting the state of the law on this important subject.

Thus, Redfield, in his work on wills (1 Redf. on Wills., *p. 557) adopts the decision in Boylan *vs.* Meeker, saying:

"The case of Boylan *vs.* Meeker is one of considerable interest upon this point. The cases are more thoroughly reviewed there than in any other place which has fallen under our notice. The points decided are thus stated: The conduct and declarations of the testator, both before and after he executed the will, are competent evidence to show his want of capacity at the time the will was executed, where the issue is upon the sanity of the testator; but after the will is made, such conduct and declarations, manifesting ignorance of the existence of the will, are not competent to show that the testator had never made the will in question. And where the execution of a will is proved in the mode required by law, the declarations of the testator, made before or after the execution of the instrument, are not competent to prove fraud, duress, or forgery, or to disprove the execution, they are hearsay merely; but such declarations, made at the time the instrument was executed, are

admissible as part of the *res gestæ*. The rule upon these points is the same in the case of wills that it is in the case of deeds."

To the same effect see—

Schouler on Wills, Sec. 241; and
Cassody on Wills (1893), Sec. 310.

Gillet on Indirect and Collateral Evidence (1897,) in treating this subject says (Section 281):

"Declarations of Testator.—In cases where the courts are called on to gauge the mental capacity of a testator, not only are his contemporaneous declarations evidence, but his prior and subsequent declarations are also admissible. There is a special reason why prior declarations are competent in such cases; this results from the fact that where chronic insanity is once shown to exist, its continuance is presumed. If a declaration throws any light upon the question as to a testator's mental condition, it is not to be rejected merely because in form the statement may be incompetent, for it can be disregarded as substantive evidence of the facts stated, and only regarded for the purpose which makes it admissible. The investigation of an issue of fraud or undue influence often requires an inquiry into the strength of the mind of the testator, and for that purpose evidence may be introduced in such cases of his declarations, but such statements, unless comprehended within the *res gestæ* of the execution of the will, are incompetent, as statements of substantive facts, to prove fraud or undue influence. The imperfectly reported case of Nelson *vs.* Oldfield (2 Vern. 76) would seem to be an authority in opposition to the last proposition, but the cases in this country are practically a unit in holding to the doctrine laid down above. A testator can not, of course, abrogate the statute and revoke his will by mere declarations, but such evidence is competent if it is a part of the *res gestæ* of the overt act of revocation. Statements by testators are often sought to be introduced as admissions, upon the theory that while yet in life their

declarations affect no vested interests but their own. It is entirely settled, however, as the testator is not a party to a contest concerning his will, that no statement of his can be introduced on the ground that it is an admission. Such statements are not in the nature of declarations in disparagement of title, but they are to be likened to the declarations of a grantor, after grant, in limitation of his grant, and are strictly hearsay. Moreover, public policy demands that the exercise of the important privilege of directing the transmission of property after death, hedged about, as it is, by rigorous statutory provisions designed to prevent imposition, should not, when the testator can no longer speak, be rendered nugatory by means of parol evidence. Even declarations which are strictly contemporaneous with the execution of the instrument are discarded where the purpose of their introduction is to contradict the instrument because 'a will must be understood to contain the testator's whole mind and intention on the subject-matters of the devise.' (2 Phil. on Ev., 1849 Ed., 350.) 'This exclusion,' says Mr. Redfield in his work on Wills (*p. 539), 'rests upon the general principle declared in all the reports, from Cheney's Case to the present day, that no parol evidence can be received to contradict, explain, supply, enlarge or qualify the words of a will, nor to explain the intention of a testator, except in the instance of a latent ambiguity, arising *de hors* the instrument, either as to the subject or the object of a bequest, and to rebut a resulting trust.' Many instances are afforded by the cases of declarations by testators which have been held competent, but, aside from statements accompanying equivocal acts, the character of which is drawn in question, it will be found that in each instance the declaration owes its competency to the fact that it sheds light on the testator's mental condition, or aids in the designation of the subject or object of the devise, or is suppletory of the will, or rebuts an equity, or tends to countervail the effect of evidence of the latter character."

This general rule, then, as well and concisely summarized

by Thompson, J., in Jones *vs.* Roberts, 37 Mo. App. 163–181 (1889)—

> "briefly is, that such declarations are admissible, not as evidence of the *facts* therein declared, but merely as evidence of the *state of feeling* of the testator at the time, and *then only* in cases where *that* is material."

This Evidence has been Uniformly Excluded by the Courts upon an Issue of Forgery in all Considered Cases of Authority.

As is shown elsewhere in this brief, the purpose for which the paper was executed, if in fact it was executed as it purports to be, is not open to examination in this proceeding (*supra*, pp. 27–30), therefore the sole question presented by this issue is, did or did not Joseph Holt write this paper; if he did, the answer must have been "Yes;" if he did not, it must have been "No."

In considering the question of the admissibility of this evidence then, the point to be looked to is, has the state of the testator's feelings any materiality to the issue, or in other words, does a knowledge of the state of the testator's feelings toward persons named and not named in the will tend to prove or disprove the physical fact to be determined in this case, namely, the writing or not writing by Joseph Holt of the paper in controversy.

While there are numerous cases in the books where wills have been contested on an issue of forgery, there are comparatively few in which the question was raised and decided as to what evidence was admissible on that issue.

It has been the earnest effort of counsel for plaintiffs in error to discover and place before this court, without reference to the nature of the decision, every case in which the question of the admissibility of evidence upon the issue of forgery of a will has been raised and decided, and it is believed that in the following pages will be found every reported decision on the subject.

From a consideration of these cases, counsel submit it will

be found that not only is the great weight of authority against the admissibility of such evidence, but that the case of Hoppe *vs.* Byers, 60 Md. 381, upon which the court below based its decision on this branch of the case, stands solitary and alone as the only judgment of an appellate tribunal holding such evidence admissible.

The leading case on this subject is that of Boylan *vs.* Meeker, 28 N. J. Law (4 Dutch.), 274–478 (1860). This case came up on a motion for a new trial before the Supreme Court of New Jersey, Green, C. J., and Whelpley, Vredenburg and Van Dyke, JJ., sitting, such eminent counsel as the late Joseph P. Bradley, afterwards a distinguished member of this court, and A. O. Zabriskie arguing against the rulings of the court below admitting such evidence as it is contended should have been excluded in the case at bar, and Cortlandt Parker and A. Whitehead in support of the rulings below. The case was submitted in 1859, and the court, at its February Term, 1860, after careful and deliberate consideration, unanimously held the admission of the evidence to be error, and ordered a new trial. Three of the judges delivered opinions, the care bestowed upon the case and the importance given it being apparent from the fullness of these opinions, covering over two hundred pages of the report.

As further indicating the importance of the matters in litigation in this case, and the energy and persistence with which it was contested, it seems proper to call the attention of the court to the history of the litigation as set out in a note appended to this decision (4 Dutch. 477), and to places in the reports where different phases thereof are reported. This case, under the same style, is found in 2 McCarter (15 N. J. Eq.) 310-358 (Feb., 1854), on appeal to the Prerogative Court from a judgment of the Orphans' Court denying probate to the will. Potts, J., who was called in by the ordinary to hear the appeal, affirmed the judgment of the lower court in an elaborate and careful opinion of forty-eight

pages, and his judgment, from which no appeal was taken conclusively established the invalidity of the will, as to personalty. In October, 1855, under the style of Turner *vs.* Hand, 3 Wall. Jr. 88, this litigation came before Mr. Justice Grier and a jury in the U. S. Circuit Court, in the form of an ejectment suit, resulting in a verdict sustaining the will. In the same volume (p. 258), under the style of *Ex parte* Turner, is reported a motion to the U. S. Circuit Court at its October term, 1858, for a mandamus to remove an ejectment suit from the New Jersey courts to that court, which motion was refused. Subsequently, in November of the same year, upon a motion for a new trial, a question of practice was presented to the Supreme Court of New Jersey, Meeker *vs.* Boylan, 3 Dutch., (27 N. J. Law), 262, and eventually, in 1860, the motion was heard on the merits and the verdict was set aside, and a new trial granted as above recited.

From the above it will be seen that the Probate Court and, on appeal, the Prerogative Court, found against the will; that an ejectment in the U. S. Circuit Court resulted in a verdict in favor of the will; and that in another action of ejectment in the New Jersey courts, resulting in a verdict against the will, the verdict was set aside and a new trial granted.*

The importance of the interests involved, the care and labor bestowed upon the case by the court, the eminence of the judges and the ability and learning of the counsel who conducted the proceedings, bespeak for the judgment and opinions of the court, it is submitted, even more than the usual consideration paid to the utterances of that deservedly respected tribunal.

The action was ejectment, and at the trial the will of Meeker was contested by the plaintiffs upon three grounds, as shown in the opinion of Whelpley, J. (p. 276), namely:

"1. Incapacity. 2. *Forgery of the will.* 3. Fraud

* Counsel are informed that after this decision (reported in 4 Dutch.) the case was compromised and the litigation thus terminated.

practiced on Meeker by inducing him to sign a paper without knowing it was a will."

Further on the learned justice, in discussing the questions presented in the court below, says (pp. 278–9):

"It is manifest, from the state of the case and the course of the argument in this court upon this rule, that the plaintiffs relied upon the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will, and that therefore he had never knowingly executed the paper.

"Upon the issue as to his sanity when he executed the paper, his conduct and declarations, both before and after that time *tending to show his want of capacity at the time*, were competent evidence for the plaintiffs. All the authorities support that position.

"But the case clearly shows that these declarations were offered, received, and pressed upon the jury as the proper foundation of a verdict against the will, on the broad ground, that even if the testator had testamentary capacity, yet that he never executed the paper as a will because these declarations showed his utter ignorance of any such paper, and were, if true, inconsistent with the idea of its execution by him."

. . . . . .

(Pp. 289–90.) "The rule is admitted by all that the declaration of the grantor of a deed in disparagement of his title, if made before he departs [*sic*] with it, are admissible against his grantee, but those made afterwards are not admissible.

"Why not receive the declarations made afterward by the grantor of a deed to show fraud or forgery, that the deed never had a legal existence as against the grantor? Suppose a father puts his son in possession of property in his lifetime, and after his death the son produces a deed for the same, duly executed and purporting to be duly acknowledged, and forgery of the deed is set up by the other heirs at law, an ejectment is brought by them against the son. He proves the deed in due form of law.

> Would the declarations of the father, made after the date of the deed, that the same was a forgery, or had been obtained by duress, be competent evidence for the heirs at law? All the cases say not, because they were made after the date of the deed. But do not the declarations prove there was no deed; and if there was none they were in time, for no title had passed? If the declarations are competent at all, they are so to prove there never was any deed. They overthrow the date, the presumed or proved time of execution, as well as the other part of the deed. The truth is, the law excludes the declaration of the grantor of a deed or maker of a will, whether made before or after the time of alleged execution, when that execution has been once proved in the mode required by law, when offered to show fraud, duress, or forgery, but admits the declarations made at the time as a part of the *res gestæ* upon this plain principle, that they are hearsay, not under sanction of an oath, not in disparagement of the right of the declarant, and therefore not against his interest. To admit them would be a departure from principle, an abrogation in fact of the statute of wills, and in the last degree mischievous and destructive of the right of testamentary disposition."

And Van Dyke, J., makes the following observations in the course of his opinion (pp. 303–5):

> "The first exception taken at the trial was to the verbal declarations of the deceased, offered not to show an insane or unsound mind on his part, but showing a sound one, and made at various times through a course of years, and to divers persons, to prove that it had long been his intention to make a different will, in some respects, from the one in question, and consequently that he could never have executed this one. There were other of his declarations offered going to different points, but all offered to show that it was very unlikely and improbable that he ever signed this will. The declarations were often isolated, far apart, and formed no part of what could be termed the *res gestæ*. It was very proper for the plain-

tiffs to show, if they could, that it was unlikely and improbable that the deceased should have signed such a will, but could they do it by such declarations? Can a will, duly and solemnly made, and abundantly proved, be overthrown by proof of such declarations? Can every party who, in good faith or in bad faith, sees fit to make the charge of fraud or forgery against a will, surrounded, it may be, with all the form and substance and sanctity known to the law, be permitted to assail it, and destroy it by calling witnesses, either few or many, to show that, according to the declaration of the testator, it had been his intention to make a very different disposition of his property, and to leave a legacy to some one which is not found in the will? What will could be safe under such a rule?

"For if the evidence can be received at all, it is because it is of a character and kind which may be allowed to prevail over a will, no matter how well it is proved. If a jury may hear it they may believe it, and act upon it, and give it preference over everything else; and all a party has to do who dislikes a will, and which may in fact be unpopular because it disappoints a whole community, is to raise the charge of fraud or forgery against it, call the dissatisfied community as witnesses to prove the promises made them by the testator in his lifetime, and which were quite different from the provisions of the will, accumulate such declarations of a talkative testator until the jury shall think they ought to prevail over the witnesses who saw the will executed, and the best prepared and best executed will in the world is a perfect nullity. One thing more may perhaps be necessary, and that is to ask the court to declare and determine that it is the exclusive province of the jury to pass upon the facts in the case, and they having done so, the court cannot interfere with their verdict. Nor does the rule derive any aid from the large number of witnesses that have testified on that subject in the present case, for if a jury can lawfully be governed by the testimony of a hundred witnesses, they may also be by that of fifty, by that of ten, or

five, or one. There is no fact that can be established by a hundred witnesses that cannot be lawfully established by one witness, unless it may be some special exception requiring more.

"It is easy to see with what danger this rule is accompanied. A man makes his will according to all the forms of law; both the subscribing witnesses have died, and no direct proof can be brought to bear on the fact of the execution. The testator, being unable to write, has made his cross. Some heir at law raises the charge of fraud or forgery against the will. No one knows anything about the affair, and to prove the signatures of the subscribing witnesses is all that remains to be done. This is accomplished quite satisfactorily, but the jury hesitates in face of so grave a charge, and then the opponent of the will finds one, two, three, or a dozen persons, who testify that they heard the testator say at different times, that he did not like the principal legatee, or that he intended to give some portion of his estate to some one else; and as no such legacy or devise appears in the will, and as such evidence is perfectly lawful and seems overwhelming, and as the jury are told by the judge that they are at liberty to believe it and act upon it, they hesitate no longer. The weight of the testimony seems to them to be against the will, and they determine to annul it. The court, on review, holds the evidence to have been competent, and as the jury have passed upon it, their verdict does not seem to be so much against the weight of evidence as to justify an interference. Here the will is destroyed simply by the admission of declarations of the testator, which may have all been correctly detailed, and yet the will be perfectly good and have been duly executed by the testator, and the same result *might* be effected in any and every case by the same means, even when all the witnesses were living and testified to the due execution of the will. There seems in fact to be no end to the mischief that might be done by the establishment of such a rule."

And again, at pages 306, 307, he says:

> "Few things are more easy than to make a false or forged bond against a deceased person and raise it against his estate, but if a subscribing witness were to swear that he actually saw the deceased obligor sign, seal, and deliver the bond, and that he subscribed the same as a witness at the time, how many declarations of the deceased obligor, made in his lifetime, that he owed nobody anything; that he had never given a bond in his life, and that there was no debt or claim whatever, that could be presented against his estate after his decease? How many such, I ask, or similar declarations, could be received in evidence to overcome the bond thus proved, even though it should then be held and prosecuted by one of his children? Not any, beyond all doubt. And why not, says the party resisting the suit on the bond; for, says he, we not only charge that this bond is forged, but we charge also that the subscribing witness is one of the conspirators in the fraud, and therefore we claim under the peculiar circumstances of the case, to lay before the jury such declarations of the deceased obligor himself, being the ancestor of the plaintiff, as must show conclusively that he never could have executed such a bond. The answer of the law would certainly be that no such declarations could be received, simply because they were incompetent and unlawful, and there was nothing in the nature of the case to justify the admission of unlawful evidence."

He then concludes his opinion on this branch of the case in the following words (pp. 307–8):

> "I think, therefore, upon principle, upon reason, upon safety and expediency, and on the express demands of the statute, that the declarations excepted to in the case should have been refused at that trial.
>
> "I think, too, *that the current of decisions, almost unbroken in this country and in England, has settled the law that such declarations are inadmissible.*"

While the above cited decision was rendered by the

Supreme Court of New Jersey, and not by the Court of Errors and Appeals, yet it is the judgment of the highest court of that State to which the case on that proceeding could have been carried. A writ of error from the Court of Errors and Appeals did not lie to the Supreme Court to review its judgment in granting a new trial; so that the only way in which the case could have been brought to that court would have been on writ of error after a new trial had been held. As already pointed out, however, the case was settled after the decision reported in 4 Dutcher, and that judgment, therefore, stands as final and controlling in that State upon the questions decided until overruled by the Court of Errors and Appeals. This decision of the Supreme Court has, however, never been overruled. On the contrary, the Court of Errors and Appeals has expressly approved the doctrine of Boylan *vs.* Meeker, in Rusling *vs.* Rusling, 36 N. J. Eq. 603 (1883), where Dixon, J., speaking of the admissibility of the declarations of a testator on the issue of undue influence, says (p. 609):

> "There is no legal principle upon which they can be treated as evidence of acts constituting undue influence.
>
> "The weight of authority touching this matter is in accordance with true principle; but it is not necessary here to review the cases. In Boylan ads. Meeker, 4 Dutch. 274, Whelpley, J., refers to many of them, examining the point with much care; and more recently in Shailer *vs.* Bumstead, 99 Mass. 112, Colt, J., has discussed the subject with great clearness of discrimination, the conclusion in both opinions being that at which we have arrived."

From the judgment of the Prerogative Court reported in 2 McCarter an appeal lay to the Court of Errors and Appeals, but none was taken, and that judgment therefore was final as to the personal estate.

The rulings of Judge Potts in that case have not, however, been followed in any court. On the contrary, in a recent

case involving the identical issue presented in the Meeker will case (forgery) the Prerogative Court followed the rulings of the Supreme Court in 4 Dutcher, declaring that decision to be a correct statement of "the law in this State at this day" (1892).

Gordon's Case, 50 N. J. Eq. 397, (1892) in which the probate of the will was resisted on two grounds: First, that the testator was not domiciled in New Jersey, and second, that it was a forgery (p. 399). The Ordinary, (Chancelor McGill,) sitting as judge both of the law and the facts, in his opinion, after carefully reviewing all the evidence says, (p. 424):

> "Before concluding I should call attention to a class of evidence much relied upon, the admissibility of which is disputed. I refer to declarations of Mr. Gordon, which make for and against the authenticity of the disputed paper as his will. I received this evidence under objection, that I might in the determination of the case pass upon its admissibility and use or reject it, according to my conclusion. It is noticed that the question upon which the declarations bear is not as to fraud exercised upon the testator to secure the execution of the will, but as to the fact whether the testator ever executed the instrument. This question was presented in the case of Boylan *vs.* Meeker, 2 McCart. 310, first in this court in 1854, where Mr. Justice Potts of the Supreme Court, sitting for the ordinary, held that such declarations were admissible, and several years later, 1860, in the Supreme Court (4 Dutch. 274), where, after exhaustive considerations of the precedents, it was held that such declarations were not admissible either to support or overthrow a will. The latter decision I understand to state the law in this State at this day. The declarations of a testator, when not offered to show his existing mental capacity, are regarded as mere heresay, and are not admissible, unless they come within a recognized exception to the rule which excludes that kind of evidence. The exceptions to the rule have been enumerated by Mr. Justice

Dixon in Rusling *vs.* Rusling, 9 Stew. Eq. 603, 608, where the principle underlying the question considered is discussed in the Court of Errors and Appeals; and Boylan *vs.* Meeker is cited with approval. So in other cases the same principle is applied. Lynch *vs.* Clements, 9 C. E. Gr. 431; Kitchell *vs.* Beach, 8 Stew. Eq. 446; Pemberton's Case, 13 Stew. Eq. 528; Middleditch *vs.* Williams, 18 Stew. Eq. 726.

"I am unable to distinguish in principle between the question here presented and that which was considered in Boylan *vs.* Meeker, and I, therefore, decide against the admissibility of the declarations upon either side."

Counsel for the caveators in the court below ingeniously endeavored to show that the separate opinions of the judges in this case, while each leading to the same judgment, did not concur in their rulings on the question of the admissibility of the evidence of declarations, and that the chief justice must be considered to have concurred only in the opinion of Judge Vredenburg.

It is submitted that such a contention is without reasonable foundation, as will readily appear upon considering what the court had before it for decision, and did actually decide.

In the trial of the ejectment forgery, fraud, and mental incapacity were set up. The motion for a new trial, which the Supreme Court had before it, was based upon two grounds, error in law in admitting the evidence upon the question of forgery, and that the verdict was against the weight of the evidence. The Supreme Court sustained the motion for a new trial upon *both grounds.*

Much, if not all, of the evidence was admissible upon the claim of mental incapacity, and in deciding that the verdict, which was general, was against the weight of the evidence, it was necessary that all the evidence admissible upon any ground should be considered. It is to this branch of the motion alone that Judge Vredenburg addresses himself in his opinion, and in that opinion he does not discuss the

question of the admissibility of any of the evidence. Had he dissented from the view of his brethren on the bench on the question of law, it is incredible that he would not have expressly so stated in a case of that importance, which was remanded for retrial, and had the chief justice concurred in such a dissent, the question of law as to the admissibility of the evidence raised by the motion could not have been sustained as the court would have been equally divided.

This view of the decision is made clear beyond question by reference to the following observations of the three judges in the course of their opinions:

Whelpley, J. (p. 279):

> "Upon the issue as to his sanity when he executed the paper, his conduct and declarations, both before and after that time *tending to show his want of capacity at the time* were competent evidence for the plaintiffs. All the authorities support that position."

Vredenburg, J. (p. 331):

> "The defendants now seek to set aside this verdict, *among other grounds*, because it is, as they allege, *against the clear weight of evidence.*"
>
> (P. 332.) "We are inquiring as to the clear weight of the evidence upon the question, whether on the evening of the 12th of January, 1852, the testator executed the paper of that date as his will."

Van Dyke, J. (p. 303):

> "The matter in controversy, as presented here, involves grave *questions of law, as well as of fact.* These in order, or so many of them as I deem important to a decision of this case, I will proceed to examine."
>
> (P. 319.) "It is also objected to this verdict, that it is *against the weight of evidence in the case.* If it be against the clear weight of the evidence it should be set aside.
>
> . . . . . .

> "If the declarations of Hoyt and the testator were stricken out, it would take from the opposition to the will much of its force; but in the view I shall *now* take of the case, *I shall consider all the evidence as having been properly received, and shall confine my examination to its force and effect.*"

Van Dyke, J. (p. 330.)

> "I am in favor of setting aside the verdict, as contrary to the clear weight of the evidence. There are a few legal points raised in the case which I have not deemed it necessary to discuss, but I *concur entirely* in the opinion, as expressed by Judge Whelpley, on these points."

As all the judges concurred in the judgment granting a new trial upon both grounds stated in the motion, it was to be expected that both Judges Whelpley and Van Dyke would comment to some extent, as they both do, upon the evidence, which was admittedly competent for some purposes, and which it was their duty to consider on the question whether the verdict was against the weight of the evidence.

That they did so was entirely proper, and does not, in the slightest degree, support an inference that their opinions are not consistent in considering evidence which was held to be inadmissible upon the question of forgery.

In fact, it is submitted, a perusal of the opinions of Whelpley and Van Dyke, JJ., will demonstrate that the reasoning of both as well as the conclusion reached is identical, though stated in different language; and that Vredenburg, J., who addresses himself exclusively to the question of the weight of the evidence, in all he says, is in entire harmony with the expressions of Whelpley and Van Dyke, JJ., on the same part of the motion.

It is to be observed that no such captious view of this decision is taken by the courts of New Jersey. On the contrary the courts of that State hold this case to be authority

on the question now under discussion, and to state the law correctly.

Rusling *vs.* Rusling, 36 N. J. Eq. 603.
Gordon's Case, 50 N. J. Eq. 397.

This question was presented to the Supreme Court of New York in Johnson *vs.* Hicks, 1 Lansing (N. Y.) 150 (1869), where the issues were:

> "1st. Did Mason Hicks, in his lifetime, subscribe his name to said instrument?
> "2d. Did he, in the presence of Philip Young and A. T. Richardson, subscribe the same?
> "3d. Did each of the attesting witnesses sign his name as a witness at the end of said instrument at the request of said Mason Hicks?" (pp. 151–2).

The case was tried before Marvin, Lamont, and Barker, JJ., the latter delivering the unanimous opinion of the court, saying (p. 158):

> "Upon the trial the appellants offered to prove the declarations of Mason Hicks, before the time of making the alleged will, that he intended to give his property to the legatees therein named, and that after the date of the will he declared that he had made such a will, and stated who the witnesses were, and that the will was in the upper town of Lockport. This evidence was objected to and excluded by the court, and the appellants excepted. This is clearly and admittedly hearsay testimony, and was properly rejected unless it falls within some of the exceptions to the general rule of law that excludes such evidence. Both parties claim under the decree, and by representation, and they take his estate subject to all claims, demands, and incumbrances thereon. As between ancestor and heir, devisor and devisee, testator and legatee, donor and donee, the declarations of the former made in regard to his estate against his interest, and in limitation or qualification of the same, are evidence against the latter, on the ground that they are privies in estate and identified in interest, and by this rule

> it is to be determined whether the evidence should have been received or not. (1 Greenl. Ev., Secs. 189, 190.) It was not against his interest to make the declaration, and it certainly in no wise affected his estate favorably or unfavorably. It remained the same, whether he had made the will or not. If he had executed the will when he made the alleged declaration, it vested no estate in the devisees and legatees named therein, and was subject to his revocation."
>
> . . . . . .
>
> (P. 159): "The statute of this State requires wills to be excuted with great solemnity and formality, and in full compliance with its provisions, and the declarations of the testator cannot be given to uphold or destroy their validity unless made at the time of the execution so as to become part of the *res gestæ*. Jackson *vs.* Betts, 6 Cow. 377. We are therefore of the opinion that the offer was properly excluded."

In Hayes *vs.* West, 37 Ind. 21 (1871), the issues were signature, mental capacity and undue influence.

Declarations of the testator to the effect that he was entirely satisfied with the laws of descent and distribution and did not intend to make a will were offered and admitted in evidence.

The defendants asked the court to charge the jury as follows:

> "The declarations or statements of a testator made at any other time than at the time when he is engaged in the execution of the instrument claimed to be his will, cannot be considered by the jury in determining the question of the execution of the will, but such declarations or statements were permitted to go to the jury for the purpose of enabling them to determine his mental capacity, and not for the purpose of proving or disproving its execution" (p. 24).

The Supreme Court after reviewing the instructions and

discussing the law and approving the doctrine as laid down by Redfield (p. 546), conclude:

> "We are of opinion that the charge asked should have been given" (pp. 25–6).

In the somewhat celebrated case involving the validity of the alleged will of the late Senator Joseph E. McDonald, McDonald *vs.* McDonald, 142 Ind. 55 (1895), the Supreme Court of Indiana affirms the same doctrine.

In that case one of the issues was that the signatures of McDonald and of the witnesses were forgeries (p. 59).

It was contended that McDonald had executed a will which had been lost or spoliated and that the one offered in this case was spurious. Declarations of Senator McDonald to John M. Butler as to the contents of his will were offered in evidence (pp. 80, 81) to prove the contents of the alleged lost will. Objection was made and exception taken to the ruling admitting this evidence. In dealing with this objection Jordan, J., for the court, says (p. 81):

> "The contention of the learned counsel for appellants is that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud or undue influence. Runkle *vs.* Gates, 11 Ind. 95; Hayes *vs.* West, 37 Ind. 21.
>
> "But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator."

The court below in its instructions to the jury with reference to these declarations had said (instruction No. 8)—

> "if you find that such declarations were made, you

> will only consider them for the purpose of determining the character and contents of such alleged lost or destroyed will, and whether, if it ever existed, it remained unrevoked at the time of the death of the testator, no inference in support of the other issues and charges in this case can be drawn by you from these alleged declarations" (p. 85).

The appellants requested the court to add to this instruction the proposition (instruction No. 10)—

> "that such declarations or statements of Senator McDonald cannot be considered by the jury in determining the question of the genuineness of the will in contest" (p. 85)—

which was refused. In considering the error assigned arising out of the refusal of this tenth instruction the Supreme Court says (p. 86):

> "It is contended by appellants that instruction No. 8 given by the court was not sufficiently clear and explicit in limiting the jurors in the consideration of the declarations in question, and that, hence, No. 10, as requested, should have been given. It is well settled by repeated decisions of this court that it is not error for the trial court to refuse an instruction requested, although accurately stating the law, if the same proposition is substantially given in another instruction."

The court then states the substance of the eighth instruction, and says (pp. 86, 87):

> "Not content with this, the court proceeded further and impressed upon the jury the fact that they were prohibited from drawing from this evidence any inference in support of the other issues and charges in the case.
>
> . . . . . .
>
> "We are of the opinion that the court embodied in its instruction all that was substantially necessary for the information of the jury as to the manner in which they were to apply and consider these declara-

> tions. We can not presume that intelligent jurors, where evidence has been admitted for a certain purpose, will consider it upon other issues, or for other purposes, when the court has expressly stated to them that they must not do so. It must be presumed that the jury obeyed the court's injunction."

In Kennedy *vs.* Upshaw, 64 Texas, 411 (1885), the issue was whether or no the codicil to the will in question had been forged. The will was dated February 8, 1883, the codicil March 15, 1883, and the testator died March 28, 1883.

Proponents offered to prove that on the 18th of March, 1883 (three days after the date of the codicil in question), the testator said in reply to certain questions (p. 416):

> "No; I have not made any change in my will, or in the disposition of my property, and I am not going to, and am surprised that you ask me such a question."

Proof of this declaration was admitted over objection.

Stayton, J., held such evidence to have been inadmissible, saying (p. 417):

> "The declarations of the testator were made subsequently to the date of the codicil, and there is no fact connected with them which can make them *res gestæ*.
>
> "There was no question as to the mental condition of the testator at the time it is claimed the codicil was executed; the sole issue was as to the forgery or no of the codicil.
>
> "The true rule as to declarations of a testator made before or after the execution of a testamentary paper, when such an issue is presented, we believe to be, that summarized by Mr. Redfield from the case of Boylan *vs.* Meeker."

The court then quotes 1 Redf., Wills, pp. 557–9, and after

referring to the laws governing the revocation of wills, says (p. 418):

> "The object of these laws is to prevent fraud and perjury, and the experience of ages bears evidence of their wisdom and of the necessity for their enforcement to avoid the evils which they are enacted to prevent."

In Walton *vs.* Kendrick, 122 Mo. 504 (1894), the will was contested as stated by the court (p. 509) on the ground that it—

> "was not written or signed by the said John W. Price, and was not signed by any other person for him, by his direction, in his presence, as provided by law; and that the said paper writing, by reason of the matter aforesaid, is not the will of John W. Price."

The will purported to bear the signature of the testator and was attested by four witnesses, all of whom testified to the testator's request that they attest the will as witnesses, and his acknowledgment at the time that it was his will. Only two of them said that at the time of so attesting, his name was appended to the paper. From the report of the case it would appear that the signature was not his own, but that his name was signed to the paper by his daughter. The will purports to have been made in 1886.

The deposition of a Mrs. Kendrick was read in the case, in which she testified, among other things, that about the year 1886 she had a conversation with the testator; that the testator told her that he had made his will; that he had not signed it, but that he had told his daughter Katie to sign it for him, and had seen her do it. Under the law of Missouri the signature by another in the presence of the testator by his direction would have been a valid execution.

The case was heard first in the Supreme Court before Division One and subsequently in banc before the whole court.

The majority of the court held that the evidence of the

attesting witnesses as to the execution, if believed by the jury, was sufficient proof of execution under the statute, MacFarlane, Justice, alone dissenting on this point (p. 530).

The contestants offered no evidence at all, yet the Court of Appeals reversed the judgment in favor of the will and awarded a new trial solely because of the admission in evidence, over objection of the contestants, of the alleged declarations of the testator made to Mrs. Kendrick, and, in so doing, adopted the opinion of MacFarlane, Justice, rendered in the case at the hearing before Division One of the Supreme Court, which opinion is as follows (p. 518):

> "Since the decision of Gibson *vs.* Gibson, 24 Mo. 234, it has been the settled law in this State that declarations of the testator made subsequent to the execution and publication of the will are not admissible as evidence of the facts stated. In his able and exhaustive opinion in that case Judge Leonard sums up the law in reference to such declarations as follows: 'The just result of the whole matter, we think, is that these declarations, so far as they are relied upon to furnish evidence of the facts they contain, are mere hearsay, and that there is no ground, either of authority or reason, to exempt them from the rule of law excluding all such testimony. We repeat, however, what we have before remarked, that, as mere verbal facts, external manifestations of what is passing within, they are always evidence of the testator's intellect and affections for the time being, provided they are of such a character, either by themselves or in conjunction with other evidence, and are so connected with the making of the will in point of time as to furnish any reasonable ground of judgment in reference to the testator's mental condition at that time.' This opinion is so conclusive and satisfactory that it has been adopted and followed in this State without question or comment wherever the question has been raised. Tingley *vs.* Cowgill, 48 Mo., on p. 298; Rule *vs.* Maupin, 84 Mo. 589; Bush *vs.* Bush, 87 Mo. 485; Spoonemore *vs.* Cables, 66 Mo. 587. In the case last cited Judge Napton contents himself by

> saying: 'We have nothing to add to what was there said.' Schouler, in his work on Wills, disposes of the subject in one brief section, as follows: 'The declarations of a testator before or after making a will are inadmissible on the issue of its execution.' Section 317*a*. To the same effect see Jones *vs.* McClellan, 76 Me. 49; Kennedy *vs.* Upshaw, 64 Tex. 411; Runkle *vs.* Gates, 11 Ind. 95; Davis *vs.* Davis, 123 Mass. 590; Kitchell *vs.* Beach, 35 N. J. Eq. 446; Herster *vs.* Herster, 122 Pa. St. 239; Caeman *vs.* Van Harke, 33 Kan. 333; Johnson *vs.* Hicks, I Lans. (N. Y.) 150; Couch *vs.* Eastman, 27 W. Va. 796. In the case last cited the court, after exhaustive review of the authorities, says: 'We have not found a single case that warrants the introduction of such evidence.' Under the law, thus well settled, we can but conclude that the declarations of John W. Price, as testified to by Mrs. Kendrick, bearing upon the execution of the will, were inadmissible."

In the case of Leslie *vs.* McMurtry, 60 Ark. 301, (1895), the question was whether the will in controversy was or was not forged.

Riddick, J., delivering the opinion of the court, says (p. 302):

> "There is only one question of law that is presented here for our determination. The appellants claim that the Circuit Court erred in refusing to allow them to prove the declarations of Hunt made about a year after the date of the instrument claimed to be his will and to the effect that he had made no will. They contend that this was competent evidence tending to support their contention that the will in question had been forged. The weight of authority on this point seems to be decidedly against this contention."

He then quotes from 1 Redf. on Wills, p. 557, and cites Schouler on Wills, Sec. 241, and continues (p. 303):

> "The reason for rejecting such declarations, when not part of the *res gestæ*, is that such declarations are

not against the interests of the testator; he is under no obligations to speak the truth and they are only hearsay evidence. It is pointed out also that the statute, having required certain solemnities by which wills may be revoked, it would be unreasonable to allow them to be defeated or disproved by the careless utterances of the testator. The question was discussed at great length in the leading case of Boylan *vs.* Meeker."

He then quotes from page 283 of that case and concludes in these words:

> "For these reasons we think the Circuit Court did not err in rejecting proof of the declarations of Richard Hunt to the effect that he had made no will."

The most recent case on this point is Swope *vs.* Donnelly, 190 Pa. St. 417 (1899), where the only issue was whether or not the will in controversy was forged. At the trial it appeared that Mrs. Donnelly, the testatrix, had died December 25, 1893. The paper propounded as her will was dated December 10 of the same year and left testatrix's property to her sister and neices, to the exclusion of her husband, who was attacked by the will. Witnesses testified to the execution of the paper, and plaintiffs, in support of the paper, introduced evidence of declarations of the testatrix, previous to the date of the will, to the effect that she wished her property to go to her own people, and did not wish her husband to have any of it; that she had left her sister well provided for, and that she had executed a will and had it with her at the time of making the declaration testified to.

A verdict was rendered for the plaintiffs in favor of the will, and a motion for a new trial having been denied (21 Pa. Co. Ct. Rep. 167 [June, 1898]), judgment was rendered on the verdict.

Fell, J., delivering the opinion of the Supreme Court reversing the judgment below, says (p. 420):

> "On the questions of testamentary capacity and fraud or undue influence in the procurement of a will, the declarations of a testator, not a part of the *res gestae*, but so connected in point of time with the testamentary act as to justify an inference that they indicate the state of the testator's mind when the will was executed, are admissible in evidence. Such declarations may be direct proof on the question of testamentary capacity, but as tending to establish the fact of undue influence they are heresay merely, and without force. . . . The proposition that the declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud, circumvention, or forgery, has received the general assent of text-writers on the subject; but the cases in which such declarations have been admitted, where the only question was that of forgery, are few. The trend of decision seems to be very decidedly in favor of their admission in corroboration of direct proof of the execution of the will, whether made before or after its date."

He then cites Turner *vs.* Hand, 3 Wall. Jr. 88; Tynan *vs.* Pascal, 27 Tex., 286; Johnson *vs.* Brown, 51 Tex. 65; Hoppe *vs.* Byers, 60 Md. 381, and Taylor Will Case, 10 Abb. Pr., N. S., 300 and continuing, says (p. 421):

> "In all of these cases it was said in effect that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses and that it was admissible only for the purpose of corroboration. . . . At the best this is a dangerous class of testimony and its admission should be carefully guarded and its effect as corroborative only should be clearly defined."

After reviewing the evidence, he continues (p. 422):

> "There was not the slightest limit as to the time when the declarations were made and under general offers the witnesses were allowed to testify to conversations had at any time during the life of the de-

ceased. This led to the introduction of testimony which was clearly irrelevant."

After noticing the declarations testified to as indicated above, he says (p. 422):

> "The writing in question, if genuine, was prepared by the deceased in the house of her sister about fifteen days before her death. The testimony of one of the witnesses tended to show that there was a prior will; that of the other an intention to make a will, and perhaps that of both a general intent that her husband should receive only such share of her estate as the law would give him. But upon the real issue, whether a will had been executed in December, 1893, this testimony threw a very uncertain light, and it was altogether too vague and remote to be considered as corroborative of the testimony of the witnesses to the execution of the writing offered as a will. The fact that a will with which the deceased was satisfied was in existence in October could not be corroborative of testimony that another will had been executed in December, and the mere expression of an intention to make a will five years before would have no weight whatever."

Thus, it is shown that in eight cases in the appellate courts of seven States, the question of the admissability of the declarations of the testator, not relating to the paper in controversy, upon an issue of forgery, has been presented and decided and in each the judgment, after careful consideration, has been unanimous against its admissibility.

In the charge to the jury in this case the court said (Rec., p. 128):

> "If this will had been found . . . among the papers of Joseph Holt, that circumstance would lend to the instrument a presumption of genuineness. . . . If any one of these subscribing witnesses—Gen. Grant, who was at the time of this alleged execution and of his alleged attestation President of the United States, or Gen. Sherman, who, I believe,

> was General of the Army at that time, or his wife—had appeared here, *I hardly think you would have any question as to the genuineness of the signature of Joseph Holt.* . . . If any other reputable person had been brought into this court who had been able to testify that he had, although not an attesting witness, seen Joseph Holt sign this paper, or that Joseph Holt had acknowledged his signature to him, *the question would have been almost absolutely foreclosed.*"

Yet no one or all of these circumstances would have unwritten any one of Judge Holt's letters admitted in evidence. No one or all of these circumstances would have unsaid any one of his alleged declarations nor undone any one of his alleged acts admitted in evidence.

Nay, more, General Grant, General Sherman and Mrs. Sherman might each have proved all the acts, declarations and letters in this Record and no one or all would have had the slightest tendency to contradict their evidence of the due execution of this paper.

This illustration serves to make manifest the utter irrelevancy and inadmissibility of the evidence. This Record will be searched in vain for an act or declaration of Judge Holt, which if true would have had the slightest tendency to contradict the testimony of a witness swearing that he saw Judge Holt sign this paper.

The Admissibility of this Evidence Supported Solely by the Decision in Hoppe vs. Beyers, 60 Md. 381 (1883.)

As stated above, every decision bearing upon the question of the admissibility of the declarations of a testator upon an issue of forgery of a will is believed to be presented in this brief. While the question has been decided with comparative infrequency, yet as above shown, in eight decisions, arising in seven States, the first in 1860, in New Jersey, and the last in 1899, in Pennsylvania, the evidence has been ruled to be inadmissible. Such a concurrence of authority in different

jurisdictions it is submitted, ought not to be ignored or even lightly regarded, but on the contrary should control the disposition of this case. Some decisions, apparently in conflict with the cases above cited, made in courts of first instance, are found in the books and will be considered later on. They are not regarded as authority, however, being decisions at the trial and not cases carefully heard and decided upon appeal. Of the cases heard on appeal, in which the question has been presented, but two, Johnson *vs.* Brown, 51 Texas, and Hoppe *vs.* Beyers, 60 Md., held the evidence admissible.

The decision in the first case was afterward overruled by the same court in Kenedy *vs.* Upshaw, 64 Texas, above cited, and is therefore no longer authority even in that State.

There thus remains but one case, that of Hoppe *vs.* Beyers, 60 Md., in which an appellate court has held these declarations admissible upon an issue of forgery.

As that decision stands alone, opposed by all the other decisons on the subject, that fact, it is submitted, might be sufficient to justify this court in declining to follow it, especially as none of the decisions rest upon any local law peculiar to the jurisdictions in which rendered, but all rest upon the general principles of evidence in common law trials by jury.

The justly high estimate which generally attaches to the opinions of the Court of Appeals of Maryland and the influence which its decisions have deservedly exercised, justify if not require, a careful analysis and an extended consideration of that decision in this brief.

The Decision in Hoppe vs. Beyers Is Unsupported by Authority.

The case arose upon a paper offered as the will of J. H. Hoppe. It purported to be a holograph paper, unattested, in the form of a letter to the beneficiary, who had been, up to the time of her marriage, an inmate of the testator's

house. It was dated in 1875, and the decedent died in 1881, at the age of eighty-one years.

The issue presented for trial is stated by the court thus (p. 382):

> "The single issue transmitted for trial in this case was whether a certain paper-writing propounded for probate on the 19th of September, 1881, by Eliza Ann Beyers, wife of John G. Beyers, as the will or testament of John Henry Hoppe, was written or signed by him, or signed by some other person in his presence or by his express direction?"

On the trial the caveatees gave evidence tending to prove that the paper was in the handwriting of the testator. The caveators introduced evidence to the effect that neither the paper nor the signature was in the testator's handwriting. The caveatees over objection and exception introduced evidence of declarations made by the testator before the date of the will to the effect that he was going to provide for the beneficiary therein named, and also evidence, over objection and exception, of declarations of the testator subsequent to the date of the will, that he had made provision for her. The jury found in favor of the will and the caveators took the case to the Court of Appeals upon their exceptions to the admission of that testimony.

While the court in its opinion indulges in a rather wide range of discussion, it will be observed that the only question presented by the record was, whether upon an issue of forgery, declarations of the testator were admissible in support of the will, to prove execution.

Miller, J., in delivering the opinion of the court, reviews the case of Griffith *vs.* Diffenderfer, *supra*, at length, holding that the doctrines of that case do not apply, and says (p. 390):

> "But the questions thus decided are not exactly the same as that now before us. In that case (as indeed in most instances where there have been

charges of fraud and undue influence) the genuineness of the instruments and of the decedent's signature thereto were admitted. The question whether, or to what extent such declarations are admissible upon a charge of *forgery* did not arise, and, in fact, we have found but very few cases in which such a question has arisen upon the single issue of *forgery vel non.* The only reported English case, brought to our notice by counsel, in which the question has been decided, is that of of Doe, *ex dem.* Ellis *vs.* Hardy, 1 Moo. & Rob. 525."

In commenting upon that case, the court says (p. 391):

"It is true this was simply a decision at a *Nisi Prius* trial, but, though made as long ago as 1836, it does not appear to have been overruled or questioned by any subsequent English authority. On the contrary, the very language of the judge has been cited and adopted by the most eminent English text-writers on evidence and wills. 2 Taylor on Ev., Sec. 1038; Roscoe's Nisi Prius Ev. (14th Ed.) 57 and 971; 1 Jarman on Wills (5th Amer. Ed. from 4th Eng. Ed.) 723. See also 1 Redfield on Wills (4th Ed.) 511, note 4.

"But apart from direct authority on the subject, if declarations of a deceased party are admissible in any case, or to any extent, or for any purpose, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present? This paper, if it be testamentary in its character (a question not to be now decided) *can be effective only as a will of personalty. It does not profess to pass real estate, and was not attested by witnesses.*"

. . . . . .

(P. 393). "But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible *if they stood alone, and had not been preceded by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct*

> *proof to establish the paper*, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence had been first given, proper for the consideration of the jury. Besides the English authorities referred to, we think the admission of such testimony under such circumstances, and for such purpose, is sustained by the majority of American cases few as they are, in which this question has directly arisen, been considered and expressly decided. Turner *vs.* Hand, 3 Wallace, Jr. 92; Taylor Will Case, 10 Abb. Pr. Rep. 300; Johnson *vs.* Brown, 51 Texas Rep. 65; Beadles *vs.* Alexander, 9 Baxter Tenn. Rep. 604."

Before considering the reasoning of the opinion, it will be advantageous to present a careful analysis of the cases relied upon in support of the decision. These cases are: Doe *vs.* Hardy, 1 Moody & Rob. 525 (cited on page 390 of the opinion) and Turner *vs.* Hand, 3 Wall, Jr. 88; Taylor Will Case, 10 Abb. Pr. Rep. 300; Johnson *vs.* Brown, 51 Texas, 65; Beadles *vs.* Alexander, 9 Baxter, 604; Sugden *vs.* Lord St. Leonards, L. R. 1 Prob. Div. 154, and Gould *vs.* Lakes, L. R. 6 Prob. Div. 1 (cited on page 394 of the opinion).

All these cases will be considered in the order above cited.

(*a*) *Doe ex. dem. Ellis* v. *Hardy, 1 Moody & Rob. 525:*

This is but the note of a trial at *nisi prius* in 1836, and the report is so brief that it is here printed in full, except the title:

> "The question in this ejectment was whether the lands sought to be recovered had passed by a codicil, said to be executed by Henry Sedcole, in 1821. The defense was, that the alleged codicil was a forgery. An *admitted codicil*, devising the property in question to the lessor of the plaintiff, dated in 1806, was put in, attested by only two witnesses, without objection for the lessor of the plaintiff, and declarations of the

testator of his intention that the lessor of the plaintiff should have the property were offered.

"These were objected to by Butt for the defendant.

"Littledale, J.: 'I think the declarations of the testator are admissible to show his intentions, where the defence is either fraud, circumvention, or forgery.'

"Verdict for the plantiff, with leave to the defendant to move on another point.

"Earle and Barstow for the plaintiff.

"Butt and Fitzherbert for the defendant."

The case is so meagrely reported as to make it impossible to apply the decision, and it cannot therefore be regarded as an authority, altogether apart from the fact of its being a hasty ruling at *nisi prius* where the court appears to have doubted the decision of the case and given the defendants leave "to move on another point."

The precise character of the declarations offered does not appear. It is impossible, from this meagre report, to determine whether they were offered in support of the admitted or the disputed codicil. It would seem the declarations were offered by the plaintiff in support of his case, but even this is by no means certain.

If, however, the declarations were in effect such as showed a knowledge or recognition by the testator of the disputed codicil such evidence would of course have been admissible, not to prove the execution of the paper, but simply to show knowledge of its existence and contents. Knowledge of the existence and contents of the paper would fairly tend to indicate genuineness because, if forged, it would be extremely improbable that the testator should have had any knowledge on the subject or even any means of knowledge.

But there is ample ground for saying that the *nisi prius* decision in Doe *vs.* Hardy is not authority, even in England, for the admission of the declarations of a testator as to his intentions or state of mind on the issue of execution *vel non*. In Atkinson *vs.* Morris, L. R. Prob. Div. (1897) 40, an at-

tempt was made to establish the execution of a will by the declarations of the testatrix. The Court of Appeal held the evidence inadmissible. During the argument Lord Russell asked defendant's counsel (p. 43):

> "Is there any case in which declarations of a testator have been admitted to prove the execution of his will?"

And defendant's counsel replied that they "are not aware of any." Surely, if this case was of sufficient authority to be the foundation of the decision in Hoppe *vs.* Beyers and in this case, it is remarkable that the judges in the Court of Appeal in Atkinson *vs.* Morris should not have known of it, and that counsel should not have cited it.

(*b*) *Turner* v. *Hand, 3 Wall. Jr. 88:*

This also is a report of proceedings at *nisi prius.* The case was tried in the Circuit Court of the United States, in 1855, before Mr. Justice Grier, and is a branch of the litigation over the will of Jonathan Meeker, already referred to (*supra*, p. 126) in the discussion of the case of Boylan *vs.* Meeker, 4 Dutcher, 274.

The action was ejectment; the plaintiff claimed under Boylan, who claimed under the will of Jonathan Meeker. The issues, as shown by the report, were *forgery* and *mental incapacity* (p. 89). In the course of the trial, objection was made to the offer to prove declarations of the testator, and Mr. Justice Grier passed on the objection in the following language (p. 92):

> "Testimony of the sort proposed is, generally speaking, not admissible; but when you have strong proof that the paper offered as a will is a forgery, and the issue is *fraud* and forgery, I think it is competent as *tending* to prove the issue. It is, however, a somewhat dangerous kind of evidence; and a court must hold a tight rein over it, in charging the jury

as to its legal effect, in relation to the positive and unimpeached evidence of execution."

Mr. Justice Grier appears, however, after consideration, to have repented of his ruling admitting the evidence, in his charge to the jury with reference to it saying (p. 107):

> "*It would be a very dangerous practice if courts were to allow the parol declarations of a testator to be given in evidence* to a jury in order to set aside a legally attested will. Why does the law require certain solemnities in order to a valid testamentary disposition of property? It is because of the fraud and perjuries which would be a necessary consequence of suffering a man's property to be the sport of loose conversations."

As appears from that charge, the will was proved by five witnesses present at its execution, three of them subscribing witnesses (p. 113); and as to four of them, the court says their—

> "characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was impossible for them to know if not true" (pp. 113, 114).

It is plainly apparent from the passages of the charge above quoted, and other similar ones condemning in even stronger language this class of evidence, that the learned justice did not intend that the declarations he had casually admitted should have any effect upon the minds of the jury, and they obeyed the court's injunction, disregarded the evidence admitted, and returned a verdict supporting the will.

Mr. Justice Grier's ruling could not be reviewed by an appellate court because, owing doubtless to his strong charge to the jury condemning the evidence, the parties against whom it was admitted prevailed at the trial. Had the re-

sult been otherwise the case would have been brought to this court and the question would not now be open for discussion here.

As already shown (*supra*, pp. 125 *et seq.*) however, when the questions involved in the case were heard in an appellate court, the Supreme Court of New Jersey took an entirely different view of them.

(c) *Taylor Will Case, 10 Abb. Pr. N. S. 300.*

This case, like the two preceding ones, was also a ruling at the trial, in the court of first instance, and was tried on the *facts* as well as the law by the Surrogate in 1871.

The grounds of contest are set out on page 302. The second *denies that the alleged testator signed the paper;* the seventh that he was of sound mind; the eighth and ninth assert fraud, circumvention and undue influence.

Apart from the objections to this decision as authority, to be hereafter shown, a careful examination of the language used by the Surrogate, will not, it is submitted, give any support to the conclusions reached in Hoppe *vs.* Beyers. He says (pp. 306–307):

> "The contestant claims it is not genuine, and has offered letters of the decedent to show declarations, and, indeed, they were offered *as declarations*—made subsequent to the date of the instrument, of such affection towards the contestant, as to be inconsistent, as her counsel claims, with the provisions of the paper in question; and that evidence was, I think, properly received, as well in respect of the question of *genuineness* as that of alleged *undue influence.* It was, doubtless, offered as to both grounds, and, if I remember the other testimony of contestant correctly, I am strongly of the conviction that a fair and proper trial of this cause requires me, on established rules of evidence, to receive such declarations as are offered to be proved *in legitimate rebuttal of the evidence for the contestant*; that is, such declarations as were made by the decedent during the short

period of his life after the date of the paper, [The will was dated June 30, 1870. The testator died August 22, 1870] *that he had made a will, with any statement by him of its provisions as correspond with, so as to identify, the paper as the one referred to.*

"To exclude such declarations would be as it appears to me, to reject matter, to say the least, clearly *not immaterial* to the principal question I am to determine upon this paper. The evidence should, however, be taken not as direct proof, but only as corroborative of the testimony of the *factum.*"

Again the Surrogate, after commenting on the latitude allowed the contestant in the matter of declarations, going back to 1867, says (p. 323):

"I yet limited the *proponents* in their offers of declarations of the decedent as to his making or having made a will (in rebuttal of the allegation of forgery of the propounded paper) *to declarations made by the decedent after the date of the paper now in question that he had made a will, with any statements by him of any of its provisions corresponding with, so as to identify the paper as the one referred to.*"

Thus it appears that the ruling in that case was founded upon a question of *proper rebuttal evidence.* Declarations in behalf of the ~~the~~ contestant appear to have been received without objection, the contestant, however, objecting to similar evidence in rebuttal.

This ruling, therefore, limited the evidence of declarations to such as tended to identify the paper; thus admitting the evidence not as showing the dispositive intent, but as showing knowledge of the existence and contents of the paper alleged to be forged.

When, however, the Surrogate comes to the question of weighing the evidence, he shows how utterly inadmissible such declarations really are when he says (p. 322):

"It only remains now for me to consider the value, force and effect of the evidence of the contestant

offered as showing or tending to show that the instrument is wholly inconsistent with the affection, acts and declarations of the decedent towards or in respect of his granddaughter; and if so wholly inconsistent I am asked to decide that the paper is not genuine and that the subscribing witnesses have committed wilful and corrupt perjury, besides being accessory to the crime of forgery."

The case was appealed from the Surrogate to the General Term of the New York Supreme Court, but upon what grounds cannot be ascertained, as it has never been reported. It does appear, however, from the report in the Court of Appeals, *infra*, that the judgment of the Surrogate sustaining the will was affirmed by the Supreme Court, and from this an appeal was taken to the Court of Appeals. The Court of Appeals *reversed* the judgment of the General Term, which had affirmed the judgment of the Surrogate, and remanded the case for trial by a jury. Howland *vs.* Taylor, 53 N. Y. 627, 628 (1873).

While it cannot be ascertained what were the questions presented upon either appeal, it is quite safe to assume that the General Term of the Supreme Court, which had in 1869, in the case of Johnson *vs.* Hicks, 1 Lans. 150, held such declarations to be inadmissible on a question of forgery, did not overrule that decision in 1871.

As the Surrogate passed upon both the law *and fact*, it was not necessary for the General Term of the Supreme Court to affirm or reverse his rulings on this question. If they considered that the evidence properly admitted sustained his judgment, they could not, as in a jury trial they must, reverse because he also considered improper evidence. Indeed, in this case and all others where the judge tries both law and fact, his rulings upon the admission and exclusion of evidence are, in general, not ground for reversal, the only question on appeal being, is there sufficient competent evidence to sustain the decree. For this reason de-

cisions in cases in equity, in admiralty, in the Ecclesiastical Courts and in Common Law Courts where a jury is waived, and in all other courts where the judge tries both law and fact, are not authority on questions of the admission or exclusion of evidence in jury trials at common law.

1 Greenleaf on Evidence, (15th Ed.) p. 75:

> "Sec. 49. Functions of judge and jury. In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence."

In Field and Others *vs.* U. S. 9 Peters, 182 (1835), Mr. Chief Justice Marshall says (p. 201):

> "In regard to the bill of exceptions, as the cause was by consent not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause, as if it were not in the record. It would not, however, of itself, constitute any ground for a reversal of the judgment."

In U. S. *vs.* King et al., 7 Howard, 833 (1849), Mr. Chief Justice Taney in delivering the opinion of the court, says (p. 854):

> "Neither is it necessary to examine in detail the exceptions taken at the trial to the admission of testimony. In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a

bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the case as if it was not in the record."

In Arthurs et al. *vs.* Hart, 17 Howard, 6 (1854), Mr. Justice Nelson says (pp. 12–13):

"As to the other objection. It was held, in Field and others *vs.* The United States, 9 Pet. 182, and recognized in several subsequent cases, that in a cause where the trial by jury had been waived, the objection to the admission of evidence was not properly the subject of a bill of exceptions; and the reason given is, that if the evidence was improperly admitted this court would reject it, and proceed to decide the cause as if it were not in the record. This, perhaps, is unobjectionable; it certainly is so, as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision can not be reviewed on a writ of error. The error, in this aspect, would be unimportant, because not the subject of an exception, the question involved being one of fact.

"If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error.

"The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence had been admitted; nor can we assume that the testimony offered and rejected would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption; because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court, instead of rejecting, had allowed the

evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion.

"We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury."

In Mammoth Mining Co. *vs.* Salt Lake Foundry and Machine Co., 151 U. S. 447 (1894), Mr. Chief Justice Fuller says (p. 451):

"As to the errors assigned in that court [the Supreme Court of Utah] to the admission of evidence, the Supreme Court observed: 'These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved, only questions of fact; and if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does.' In its assignment of errors here, appellant specifies substantially the same exceptions to the admission of evidence, including the overruling of defendant's objections to questions. The evidence thus objected to was cumulative in its character and not of controlling importance, and if excluded, it is sufficiently clear that the result would not have been otherwise than it was. All the evidence is in the record, and we have carefully examined it, and, as we are of opinion that the rulings complained of, if erroneous, did not constitute reversible error, we need not pass upon their corrrectness, though we are not to be understood as intimating that the objections should in any instance have been sustained."

In Grayson *vs.* Lynch, 163 U. S. 468 (1895), Mr. Justice Brown, says (p. 476):

"We think there is nothing in this statute to take this case out of the general rule, so frequently announced, that in cases where a jury is waived, the

> findings of fact by the court have the same force and effect as the verdict of a jury, and that the appellate court will not set aside the finding and order a new trial, for the admission of incompent evidence, if there be other competent evidence to support the conclusion."

The same rule prevails in the courts of New York.

In Brick *vs.* Brick, 66 N. Y. 144–156 (1876), which came up on appeal from the surrogate's degree, Rapallo, J., for the court, says:

> "In this class of cases the admission of improper evidence is not ground for reversal if it appears on the whole case that the will was properly admitted to probate (Clapp *vs.* Fullerton, 34 N. Y. 195; Schenck *vs.* Dart, 22 id., 421)."

In Clapp *vs.* Fullerton, 34 N. Y. 190–195 (1866), Porter, J., says:

> "The admission of improper evidence on the original hearing [before the surrogate] furnishes no ground for reversing the final decision, if the facts established by legal and competent testimony are plainly sufficient to uphold it."
>
> See, also, In re Paige, 62 Barb. 476–479 (1871), and Will of Smith, 95 N. Y. 516–527 (1884).

In re Crawford, 5 L. R. A. 71 (1889), Mr. Justice Peckham, in reviewing on appeal a surrogate's decree, speaking for the Court of Appeals of New York, says* (pp. 77–78):

> "It is objected that the evidence thus received was incompetent under section 829 of the Code, and also because it was a declaration of the intestate which did not accompany an act, and was not a part of the *res gestæ*. If it be assumed that the evidence was erroneously received on both grounds, we do not

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*The portion of the opinion quoted is omitted by the reporter from the official report of this case, 113 N. Y. 560, as appears by his note at page 568.

think that any reason exists for reversing the determination of the surrogate as to the moneys deposited. Striking out all the objectionable evidence, and there remains enough uncontradicted and legal evidence to call for the decision of the question of gift, or no gift, in the same way as it now stands.

"The same question arising under the evidence of Dr. Boyd may be answered in the same way. . . . Strike it out, and there is evidence sufficient remaining (which is uncontradicted) to demand the decision which the surrogate made. Without, therefore, deciding the question as to the admissibility of the evidence, we think the surrogate's decision regarding the gift was proper in any event."

(*d*) *Johnson* v. *Brown, 51 Texas, 65:*

This is a decision by an appellate court, rendered in 1879, and is the first and only decision by such a court upon this question, cited in the opinion in Hoppe *vs.* Beyers.

Judge Bonner, in delivering the opinion in that case (p. 80), holds that the declarations of the testator were—

"properly admitted in evidence—not of themselves as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance, in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will, as evidence of an independent collateral fact—the state of feeling between the parties—and which would in some degree tend to prove the issue before the court."

It is not altogether clear upon what grounds the conclusion reached by the court in that case is based; but if the decision is to be taken as holding such declarations admissible on the question of execution, it is unequivocally overruled by the subsequent case of Kennedy *vs.* Upshaw, 64 Tex. 411, (cited *supra*, p. 141,) in which it is distinctly held that such declarations are inadmissible, the court in the

latter case adopting the doctrine laid down by Redfield and by the court in Boylan *vs.* Meeker, 4 Dutcher, *supra.*

It is a somewhat remarkable circumstance, indicating the obscurity of the opinion in the case of Johnson *vs.* Brown, that in Kennedy *vs.* Upshaw counsel on each side cite it in support of both the admission and exclusion of the testimony (64 Tex. pp. 413, 414), and the court cites it as authority for *excluding* the evidence (p. 419).

It is respectfully submitted that the opinion of Judge Bonner in Johnson *vs.* Brown can not be regarded as a safe guide to judicial decision; and being an overruled case, it can furnish no support to the opinion in Hoppe *vs.* Beyers.

(*e*) *Beadles* v. *Alexander, 9 Baxter, 604:*

In this case, decided in 1877, no claim of forgery was made, the only question being whether the testator had signed in the presence of the subscribing witnesses. One of the witnesses was dead, and the other testified to the signing by the witnesses, and that "according to his recollection the testator was not present."

The declarations admitted were to the effect that the testator had himself taken the will to the witnesses to sign. The court concedes that these declarations were hearsay, but seems to think they were hearsay of a somewhat superior order, saying (p. 606):

> "They do not stand as mere hearsay declarations *of other parties.* They are the declarations of the testator *as to his own acts,* and about which he must certainly know; and, in general, he has no motive to speak falsely, and both parties claim under him, one as devisee or legatee, the other as distributee and heir. His declarations are not introduced to establish the particular fact by force of the admission or statements alone, but for the purpose of corroborating and supporting the presumption arising from the fact that the will bears the genuine signatures of two competent subscribing witnesses, and to contradict

the testimony of the witness who, although he admits his signature, yet denies the testator's presence."

In support of this ruling the court relies upon the case of Reel *vs.* Reel, 1 Hawks, 248, and the other North Carolina decisions resting upon the now thoroughly exploded doctrine that such declarations are admissible as the declarations of a party in interest against his interest or in disparagement of his title.

This doctrine is fully met and effectually disposed of by Selden, J., in Waterman *vs.* Whitney, 11 N. Y. 157–164, as follows:

> "In one of Cowen and Hill's Notes to Phillipps on Evidence (see n. 481, p. 257) it seems to be insisted that the declarations of a devisor are admissible against the devisee, upon the same principle with those of an ancestor against the heir, or of a grantor against his grantee. Perhaps they may be, where the declaration is in regard to the estate; but where it has reference to the validity of the will, the case is entirely different. Declarations of an ancestor, grantor, &c., are admitted, because they are against the interest of the party making them, and might when made have been used against him. *But these reasons do not apply at all to the declarations of a testator in regard to his will. He has no interest in the matter, and the declaration could never under any circumstances be used against him personally. The distinction is obvious and material.*"

Further very conclusive demolition of this doctrine of Reel *vs.* Reel and the cases following it will be found in the opinion of Mr. Justice Brewer, in Mooney *vs.* Olsen, 22 Kans, 69, 76 (1879); in Johnson *vs.* Hicks, 1 Lans. 150, 158, and in Boylan *vs.* Meeker, 4 Dutch. 274–289.

Entirely apart from the unsoundness of the decision in Beadles *vs.* Alexander, that case has no application to the question under consideration in Hoppe *vs.* Beyers, and can therefore in no way support the conclusions there reached.

(*f*) *Sugden* v. *Lord St. Leonards, L. R. 1 Prob. Div. 154.*

This case is referred to in a postscript to the opinion.

It has already been shown what the questions in this case were (*supra*, pp. 104–105). There was no question of forgery, the execution of the will being admitted and the only questions were whether the contents of the will could be proved by parol and whether the presumption of revocation from non-production at the death of the testator could be rebutted by declarations of the testator.

Instead of being an authority in support of the admission of declarations to prove or disprove execution, it is directly opposed to their admission for such purpose. Thus, Cockburn, Ch. J., passing on these questions in the appellate court, says (p. 226):

> "I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though, of course, not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are no doubt cases in which the declarations of a testator are inadmissible. Thus a statement by a testator that he had duly executed his will could not be received as evidence of its due execution, as was decided in the Goods of Ripley (1 Sw. and Tr. 68), and there is good reason for the decision, namely, that the exercise of the testamentary power, being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right."

And further on (p. 229), discussing the ruling in Doe vs. Palmer, (16 Q. B. 747, 20 L. J. Q. B. 367), he says:

> "What it comes to is that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the

contents of his will where the execution is not the question.

He concludes his discussion of the question in the following terms (p. 229):

> "I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible *to prove its contents.*"

In this case, also, the court tried both the law and the facts and the rulings are therefore not authority in common law trials before a jury.

That the doctrine announced in Sudgen *vs.* Lord St. Leonards is not to be followed to the full extent of the language used as a correct statement of the law, even in England, will be seen by reference to the decision of the House of Lords in the case of Woodward *vs.* Goulstone, 11 Appeal Cases, 469, (1886), in which Lord Herschell, the late Lord Chancellor, Lord Blackburn, and Lord FitzGerald criticize the extent to which that case went, and while not expressly overruling it, expressly withhold the approval of the House of Lords from it as authority to its full extent, Lord FitzGerald saying (p. 485):

> "That case might be truly said to have reached the very verge of the law and it ought not to be extended."

(*g*) *Gould* v. *Lakes, L. R. 6 Prob. Div. 1.*

This is the last decision cited in the opinion in Hoppe *vs.* Beyers, and like most of its predecessors is a decision at the trial in a court of first instance where the judge tried the fact as well as the law.

It has already been shown (*supra*, p. 105) that the question in this case had nothing to do with the fact of execution, which was not in issue, but concerned only the question

whether both of two sheets of paper stitched together were the will of the testatrix, or only one of them.

The case has no possible relevancy to any question arising in Hoppe *vs.* Beyers, and can give it no support.

From this review of the cases relied on it is clear that the opinion in Hoppe *vs.* Beyers stands unsupported by any authoritative decision.

What is still more remarkable, and probably explains the decision in that case, is that while the court was groping its way in the dark and regretting the absence of precedent to guide it, it seems not to have been advised that there were authoritative decisions of appellate courts plainly in point and deciding the question in direct opposition to its conclusions.

The cases of Boylan *vs.* Meeker, decided by the Supreme Court of New Jersey in 1860; Johnson *vs.* Hicks, 1 Lansing, decided by the Supreme Court of New York in 1869, and Hayes *vs.* West, 37 Ind., decided by the Supreme Court of Indiana, in 1871, had all been reported before the decision of Hoppe *vs.* Beyers (June 20, 1883), yet none of these decisions is referred to by either the court or counsel in that case.

(*h*) *The Reference to Text-writers.*

In addition to the foregoing references to decided cases, the opinion in Hoppe *vs.* Beyers refers to certain text-books on Evidence and Wills in connection with the *nisi prius* decision in Doe *vs.* Hardy as supporting its conclusions. The first reference is to Taylor on Evidence. It is quite true that Taylor, in his work on Evidence (Am. Ed. from 8th Eng.) p. 968, Sec. 1136, makes use of the following language:

> "The declarations of a testator are admissible to show his intentions if the will be impeached on the ground of fraud, circumvention or forgery."

And in support of this text he cites the cases of Doe *vs.* Allen, 8 T. R. 147 (1799), and Doe *vs.* Hardy, 1 Moody & Rob. 525 (1836).

In the first case, Doe *vs.* Allen, a decision at *nisi prius* in an ejectment, a second will was relied upon, which it was claimed was invalid because procured under a false representation. As stated in the report the evidence offered was—

> "that *at the time of the execution*, the testator enquired whether it was the same as the former, and was told that it was" (p. 147).

In ruling upon the admissibility of the evidence, Lord Kenyon says (p. 148):

> "And the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute."

And Grose, J., says:

> "It seemed to be admitted at the bar that evidence may be given to shew that one paper was substituted for another; and that I think is sufficient to decide this case. *For the evidence proposed to be given was this, that when the testator asked for a duplicate of his former will the persons about him substituted another instead of it.*"

Thus the question of forgery did not arise, the execution was admitted, and there was no declaration by the testator, but a question asked and falsely answered *at the very moment of executing the paper*; this was plainly of the *res gestæ*.

Doe *vs.* Hardy, the other case cited by Mr. Taylor, has already been fully discussed. These two cases being the exclusive foundation for the statement above quoted, the opinion in Hoppe *vs.* Beyers cannot be better supported by the text-writer than by the decisions on which he relies and which are shown to constitute no basis for his position.

Roscoe, in his work on *Nisi Prius* Evidence, does not discuss the question nor consider or cite other authorities, but simply says (14th Ed., 1879, p. 57):

> "On a somewhat similar principle the declarations of a testator as to his intentions are admissible *to support* his will if disputed on the ground of fraud, circumvention or forgery,"

and cites Doe *vs.* Hardy.

As, in his text he confines the admissibility of the evidence to the "*support*" of the will he probably understood the declarations in Doe *vs.* Hardy as tending to show such knowledge on the part of the testator of the existence and contents of the disputed will as would tend to rebut the charge of fraud or forgery. But there is certainly nothing in his text justifying the conclusions reached in the opinion in Hoppe *vs.* Beyers.

It is worthy of remark, however, that another distinguished writer on Evidence (Starkie) does not adopt the doctrine of Doe *vs.* Hardy, nor cite it, although he does cite and approve Doe *vs.* Allen. (Starkie on Evidence, 2d Ed., Vol. 2, p. 927; 10th Ed., *p. 672.)

Greenleaf in his work on Evidence does not mention the case of Doe *vs.* Hardy. Wharton in his work (Sec. 1009) cites it together with Doe *vs.* Allen, but only as authority for the proposition that where "fraud or coercion is alleged *in the concoction of a will*, such fraud may be proved by parol." He adds, however, in the same section: "But declarations uttered *long afterwards, in no sense part of the transaction*, can not be received to prove fraud."

Jarman cites the case, but confines it as authority to the proposition that the declarations of the testator may be received *in support of the will to rebut the charge of fraud.* (1 Jarm. on Wills, p. 390, 6th Am. from 5th English Ed.)

The only other text-book referred to in Hoppe *vs.* Beyers is Redfield on Wills, Vol. I (4th Ed.), p. 511, note 4.

The learned justice in this reference to Redfield as an

approval by that author of the case of Doe *vs.* Hardy was evidently misled by a most extraordinary lapse on the part of the editor of the edition cited.

The place in Redfield in which this case is found cited (under the erroneous reference of "1 Moo. & Ry. 525," there being no such report), is in a vagrant note, having no possible relation to the subject of the text there under discussion by the author. The text to which the note is appended is as follows:

> "So also, where a devise is induced by a contract with the devisor, creating a trust, in contravention of the express provisions of the statute, as the Acts of Mortmain, the devisee may be compelled to disclose the trust" (*p. 511).

Not only has this foot-note no sort of relevancy to the text above quoted, but it is submitted, is absurd on its face. The language of the note is that:

> "In *all cases* where fraud or forgery is alleged, the declarations of the testator either, before or after the execution of the will, have been received."

And in proof of this sweeping assertion as to the rule "in *all cases*" the writer of the foot-note cites a *single case*, and that one, as heretofore shown, the loose and ill considered expression of a judge at *nisi prius* in a vaguely reported case.

Such a generalization of the law, from an isolated episode at *nisi prius*, cannot bespeak for the writer of the foot-note sufficient confidence to become the basis of judicial reliance.

What is more important still, and shows how far the learned Justice of the Court of Appeals of Maryland was mislead in relying upon this foot-note, is that he nowhere notices and seems entirely to have overlooked the fact that, in that part of his book where Redfield does discuss this

question (*pp. 542–560), the learned author utterly repudiates the doctrine of this irrelevant foot-note and *distinctly approves in the body of his text* (*p. 557) the case of Boylan *vs.* Meeker, 4 Dutcher, 274.

It is therefore clear that the opinion in Hoppe *vs.* Beyers is wholly unsupported by authority, was against the weight of authority at the time, while in every decision since, the contrary rule has been declared.

The Decision in Hoppe vs. Beyers is Unsound in Principle and Reason.

The opinion in Hoppe *vs.* Beyers, while opposed by the decision of every other appellate court in which the question has been considered, on examination, will also be found not to rest on sound reason. The will in that case was an informal, unattested paper written on the back of a letter, and it would seem from the report of the case, that the only evidence of its execution was that of handwriting which was contradicted. This circumstance appears to have impelled the court's decision, because it says (p. 391):

> "There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting by witnesses acquainted with it, was the only *direct* testimony by which the genuineness of the instrument could be established or assailed. . . . But in this state of case was no other evidence admissible?"

It not infrequently happens that the decision of a case is embarrassed by the paucity of evidence to enlighten those who have the duty of deciding it, and hardship, and doubtless injustice, have sometimes been suffered for lack of evidence to support the right, but such cases do not, it is submitted, justify a disregard of the rules of evidence.

There is no possible means of providing against the death of witnesses and the law has always been, even in respect of

those writings to which subscribing witnesses are required, that proof of handwriting alone in the event of death or inaccessibility of such witnesses will suffice. Indeed, if the will be more than thirty years old, the mere production of it from the proper custody is sufficient to prove it without any evidence of handwriting or other evidence of execution. 1 Greenleaf's Ev. (15th Ed.), Sec. 21.

If the fact that no witness can testify to the physical act of signing or writing of a paper be ground for admitting this class of evidence there is little use in having written evidence of any thing.

A very large and important part of the business of the world depends and is conducted upon faith in the ability of persons to recognize the handwriting of one another and to determine its genuineness without the aid of witnesses to the act of writing.

The purpose of the law in requiring wills to be in writing is that their establishment may not depend upon just such evidence as was admitted in Hoppe *vs.* Beyers. According to the opinion in that case, if the genuineness of the writing be disputed, the declarations of the testator are to be admitted for the purpose of showing whether the provisions of the will are consistent with the intentions which those declarations seem to indicate and from this to determine the probability or improbability of his having written the paper. As no one can pretend to actual knowledge of a testator's intentions, nor even to remember and repeat all of his declarations or his exact words, but can only give the substance as it is understood by the witness, the validity of the most important will, executed in the most solemn manner, is made at once to depend upon the impressions which the testator may have made of his purposes upon those who may have observed his actions or heard his remarks, without reference to his real purposes or the motives by which he was actuated at the time.

When to this is added the facilities for corruption and

perjury which such a rule would afford, its impropriety and danger are at once apparent.

It is true, that the court says of those declarations that (p. 393):

> "They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof."

It is to be remembered, however, that the weight of such evidence, is for the jury; and once it is admitted for their consideration, the court's control of its use is at an end, except by setting aside the verdict.

In a previous part of the opinion the court says (p 391):

> "If declarations of a deceased party are admissible in *any case*, or to *any extent*, or for *any purpose*, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present?"

It is respectfully submitted that this question admits of a simple and very obvious answer; namely, the difference in the issues.

The competency of all evidence, when objected to as irrelevant, is to be determined by the issue to be tried.

In cases where malice and fraud are in issue, the intent of the person charged is material and relevant; while in mere breaches of contract or torts from negligence, motive and intent are immaterial, the act and consequent injury alone being the subject of inquiry.

So, also, where the issue involves the mental condition of the testator, all his acts and declarations are direct original evidence to show his mental condition; but where the mental condition is not in issue, evidence upon that subject is as inadmissible as would be evidence of handwriting upon an issue of mental capacity, where execution is admitted.

Again, the court says (p. 393):

> "But in thus sustaining the ruling excepted to, it

> must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been *preceded* by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof."

How the declarations of the testator as to his intentions could corroborate the "direct proof of witnesses as to the genuineness of the handwriting" is not explained.

The *opinion* of a witness as to the genuineness of handwriting must be based upon his knowledge of the testator's writing, acquired from actually seeing it, and not upon his knowledge of the testator's intentions, and it is impossible that the intentions of the testator could strengthen or weaken the mental image of the testator's writing from which such a witness testifies. So a witness testifying that he actually saw the testator write the paper in dispute could not be corroborated nor contradicted by the declarations of the testator's intentions.

If, therefore, the only ground of admitting the testimony is to corroborate evidence as to handwriting, as stated in the opinion, it is plainly not admissible at all.

The effect of the ruling in Hoppe *vs.* Beyers is this: Given a witness who will testify to the genuineness of the handwriting and one who will testify to its non-genuineness, at once the way is open to receive all the alleged declarations of the testator.

Thus the range of the evidence upon the issue of forgery under this rule is as wide as upon issues of mental capacity and undue influence, and the effect much broader in that from it the jury are to determine, not what manner of man the testator was or by what circumstances influenced, but whether he did the act.

The decision in Hoppe *vs.* Beyers, standing as it does, not only wholly unsupported by any authoritative decision,

but directly opposed by all, should certainly rest upon very solid foundations in reason to justify its adoption as the proper rule of law against the united authority of all other considered cases.

It is submitted that such foundation is shown to be wanting.

The General Character of the Evidence in Proof of Forgery Admitted Over Exception in This Case.

The error in admitting in evidence alleged declarations and acts of Judge Holt as tending to show his feelings or the state of his mind was accentuated by their remoteness, in point of time, from the date of the will. The general character of this evidence and its relation in point of time to the date of the will may be briefly detailed.

The court admitted in evidence, the testimony of Mr. Barclay, *that in November, 1893*, more than twenty years after the date of this will, Judge Holt had said he had made his will and left some pictures to Mr. Barclay's mother (Rec., pp. 28, 29).

Again the testimony of Mrs. Briggs that between 1888 and 1891, from fifteen to eighteen years after the date of this will, Judge Holt told her that Washington Holt would attend to his affairs, and it would be all right (Rec., pp. 36, 37). To this was added the admission in evidence of alleged declarations by Judge Holt to Washington Holt and others, claimed to have been made during the period from 1884 to 1893, from eleven to twenty years after the date of the will in controversy, to the effect that he had made a will containing various provisions wholly different from those of the paper in controversy (Rec., pp. 39, 40, 78, 79).

Also the testimony of Washington Holt, to the effect that in 1893, twenty years after the date of this paper, Judge Holt had said to Washington Holt: "Washington, I want you to know that everything I have is yours" (Rec., p. 79).

In connection with these alleged declarations of the

testator, the court also admitted in evidence alleged acts and declarations of Judge Holt, many years after the date of the will, as to his alleged kindly feelings towards various of his next of kin, who are not mentioned in the paper in controversy, *some of whom were not even living at the date of this will* (Rec., pp. 49, 50, 60, 67, 68, 78).

For instance, testimony of alleged declarations by Judge Holt, made in 1889 and later, more than sixteen years after the date of the will, as to his feelings towards James Holt, a brother who had died childless in 1867, six years before the making of the will in controversy (Rec., p. 68); so also testimony as to alleged declarations by Judge Holt, claimed to have been made in 1891, eighteen years after the date of the will, as to Mrs. Bowmer, a niece of Judge Holt (Rec., p. 68); and also testimony as to his personal relations in 1893, twenty years after the date of the will, with Mary Holt, a grandniece (Rec., p. 69).

The court also admitted in evidence, testimony of Mrs. Briggs that in 1881, eight years after the date of the will, she spoke to Judge Holt with reference to Mrs. Throckmorton, Sr., the grandmother of Josephine, the legatee, and he said: "I do not know the Throckmortons" (Rec., pp. 31, 34, 35, 36). That also, near the close of President Arthur's administation (1884 or 1885), eleven or twelve years after the date of the will, she had seen Judge Holt treat Major Throckmorton, the father of Josephine, with discourtesy at a Presidential reception (Rec., pp. 35, 36). Major Throckmorton, however, testifies that he was not present at the reception nor in Washington at the time (Rec., p. 110).

The court also admitted in evidence, the testimony of Martha Scott, a servant of Judge Holt, that subsequent to 1882, nine years or more after the date of the will, Judge Holt refused to see Mrs. Throckmorton, Sr., the grandmother of Josephine; that he refused to accept fruit and flowers from her (Rec., p. 82); and also the testimony of the same person, to the effect that after 1890, more than

seventeen years after the date of the will, Judge Holt declared that "the Throckmortons were his enemies, and that he did not wish to see them" (Rec., p. 82).

And the court also admitted the testimony of the same witness, to the effect that after 1892, more than nineteen years after the date of the will, Judge Holt had called Major Throckmorton, the father of Josephine, a scoundrel (Rec., pp. 82, 83), although the same witness testified that she *never heard Judge Holt speak unkindly of Josephine Throckmorton, the legatee* (Rec., p. 83).

The court also admitted the testimony of George A. Johnson, a coachman of Judge Holt, to the effect that from 1878 to 1880, from five to seven years after the date of the will, the relations between Judge Holt and Mrs. Throckmorton, Sr., the grandmother of Josephine, were very friendly; that Judge Holt placed his carriage at her disposal and had witness drive her wherever she wished to go, but that about 1880, seven years after the date of the will, he became hostile to the grandmother of Josephine (Rec., p. 83).

The will in this case, if genuine, was executed in February, 1873. The Record will be searched in vain for any evidence in the slightest degree tending to show that at that time Judge Holt's relations with the parties named in the will were in any respect inconsistent with the benefits conferred on them by that instrument. There is not the slightest pretence in the Record that he ever at any time declared his purpose to bestow any part of his estate upon any of the nine caveators in this case, except Washington Holt, and even as to this alleged purpose no expression to that effect is attributed to him at any time earlier than about ten years after the date of the will.

It is a significant fact also that while alleged oral declarations of his purpose to make a will in favor of Washington Holt are given in evidence, yet the mass of letters from

Judge Holt will be read in vain for a syllable of suggestion in that direction.

That Judge Holt was not averse to writing on such topics when so inclined, and in contrast with the utter absence of any written communication of this nature to any of the caveators, may be noted the letter to Miss Hynes of February 24, 1885, (Rec., p. 91) plainly intimating that she might expect further benefit from him by will.

A careful examination of this testimony, and indeed of all the evidence in the Record, will demonstrate that its purpose and tendency was to show a change in Judge Holt's personal relations with his kindred from a condition of practical non-intercourse with most of them prior to and about 1873, to a gradually increasing interest and regard beginning about 1880, in the course of which the wife of Washington Holt appears to have acquired an ascendancy over Judge Holt, to the exclusion of all his kindred, certainly in so far as financial benefit is concerned.

It must be constantly borne in mind in considering the question of the admissibility of this evidence that its *weight* is a question exclusively for the jury, over which the court can exercise no control.

When, therefore, any matter is admitted in evidence, it is for the jury alone to say whether they will believe it and what weight it shall have in their deliberations and conclusion.

Applying this principle to the evidence admitted, and the manner of its submission to the jury, it follows, of necessity, that if the jury believed that in 1893, when he was eighty-six years old and blind, Judge Holt said he had made a will leaving pictures to Mr. Barclay's mother, they could find that he did not make a different will twenty years before.

So, if they believed that in 1892 he had called Major Throckmorton a scoundrel, they could find that he did not entertain different opinions of him nineteen years earlier, although his written declarations before and after 1873

praise Major Throckmorton in almost extravagant terms, and no witness testifies to a single fact impeaching his character or to any fact, good or bad, upon which the alleged charge of scoundrelism was based.

So, also, if they believed that in 1889 he spoke kindly of a brother who had died childless in 1867, they could find that he had not made a will in 1873.

The Court of Appeals, as will be shown hereafter, held that the remoteness in time of the declarations from the date of the will in controversy was of no materiality, thus affirming that the issue of forgery could be determined by evidence of a state of feeling existing at *any* time during the testator's life.

If this doctrine is to prevail it will be seen that if at *any* time in his life a testator made, or be alleged to have made, declarations inconsistent with his will, a jury would, upon an issue of forgery, be permitted to find that at *no* time did he entertain the feelings indicated by the will, and from that conclude that he never executed it, which is the *reductio ad absurdum*.

Thus it will be seen that the testimony, instead of throwing any light upon the probable intentions and state of mind of the testator in February, 1873, at the time the will purports to have been made, ignores that time.

Whatever force evidence of that sort might have upon an issue of revocation, if there was any competent evidence laying the foundation for its introduction, it could shed no possible light upon the state of the testator's mind at the time the will purports to have been made.

Evidence Tending to Show Mere Probability, Inadmissible.

In the portion of the charge to the jury excepted to by the 36th and 37th Exceptions (Rec., p. 141), the court submitted to the jury all the evidence in the case, especially that admitted over objection—

> "*as bearing upon the probability, the likelihood*, of his having made such disposition of his estate as is made by this paper in controvery" (Rec., p. 131).

Even admitting that the foregoing and similar evidence could raise a logical probability against Judge Holt's having executed the paper, the probability would be too fanciful and conjectural to be allowed as a legal inference by the jury, and the remoteness of the declarations are an additional reason for their exclusion as evidence. While evidence which tends to prove the issue or from which justifiable legal inferences may be drawn tending to prove the issue, is to be admitted, evidence which simply raises a probability is incompetent.

In Thompson *vs.* Bowie, 4 Wall. 463 (1866), Mr. Justice Davis, in delivering the opinion of the court, says (p. 470):

> "Thompson brought suit in the court below to recover on three promissory notes, purporting to be given on the first day of January, 1857, by Bowie to Steer, and indorsed to him. Bowie sought to avoid their payment on the ground that they were founded on a gaming consideration, and therefore void, even in the hands of an indorsee, without notice, because the statute of 9th Anne, avoiding gambling contracts, was in force in the District of Columbia, where they were executed. There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defence. A brother of the defendant was called by him, and allowed to testify; that whenever his brother was under the influence of liquor, he had a *propensity to gamble*, and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, and payable to the keeper of a gaming-house, the inference is fair and reasonable, that they were given for money won at play.
>
> "Did the court err in admitting this evidence?
>
> "If it did err in this matter, then the judgment

must be reversed, for, undoubtedly, the jury, in the formation of their verdict, must have been greatly influenced by testimony that the general character or habit of Bowie was to gamble when intoxicated.

"All evidence must have revelancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Bowie to gamble, when drunk, legally tend to prove that he *did* gamble on the day the notes were executed? The general character and habits of Bowie, were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury that, when drunk, he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases.

. . . . . .

"The uniform habit of a party to loan money at usurious interest, was not considered by the Supreme Court of New York a legal foundation for a verdict

establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable that the case under review was of that description (Jackson ex dem Norris *vs.* Smith, 7 Cowen, 719). The uniform habit of Bowie, when drunk, to gamble is not a legal foundation for this verdict, *although it is highly probable that the notes in controversy were executed by him for a gaming consideration.*"

Xenia Bank *vs.* Stewart, 114 U. S. 224, (1884), was an action to recover the value of certain stock certificates sold by the bank, the bank alleging that they were deposited as collateral for a loan which was overdue and unpaid.

Mr. Justice Woods delivering the opinion says (p 230):

"It further appears by the bill of exceptions that the plaintiff in error offered evidence to prove that, for more than a year previous to his death, McMillan had been 'hopelessly insolvent,' and had experienced 'great difficulty in procuring means to meet his interest obligations.' The defendants in error objected to this evidence, it was ruled out, and the plaintiff in error now assigns its exclusion as error.

"The purpose of the evidence was to prove that McMillan had not furnished the money to pay his note for $2,600 held by Hyde. The evidence offered was *inadmissible because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.* United States *vs.* Ross, 92 U. S. 281; Carter *vs.* Pryke, 1 Peake, 95; Hollingham *vs.* Head, 4 C. B. N. S. 388; Jackson *vs.* Smith, 7 Cowen, 717; Baird *vs.* Gillett, 47 N. Y. 186; Thompson *vs.* Bowie, 4 Wall. 463."

He then reviews the case last cited, and continues (p. 231):

"The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely,

> whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid. Proof of the insolvency of a debtor is no more competent to show non-payment, than proof of his solvency is competent to show the payment of his debts. These two kinds of proof stand on the same footing. The latter kind has been held to be incompetent. Hilton *vs.* Scarborough, 5 Gray, 422. The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt. We think the evidence of the insolvency of McMillian was properly excluded."

This same principle has been applied to cases involving the validity of wills where the probability or improbability of the provisions were urged in support of, or against genuineness.

Thus in Rutherford *vs.* Maule, 4 Hagg. Eccl. Rep. 213 (1832), *supra* p. 50, Sir John Nicholl says (p. 226):

> "If then the act had been connected with the deceased, and the question had turned on her capacity, volition, or on fraudulent imposition, the high probability of the bequests would have had much influence on the decision; but as proof that the instrument is not a forgery, the probability of the bequests is of very little weight; for any person sitting down to forge a will would introduce into it probable bequests, and also bequests to those persons who would be best able to prove it a forgery, in order to conciliate and quiet them. Probability of disposition is, therefore, consistent either with the supposition that the paper is forged, or that it is genuine."

In Wood *vs.* Goodlake, 2 Curteis Eccl. Rep. 82, Sir Herbert Jenner says (p. 198):

> "But, after all, the probability of the disposition, in such a case as this, goes but a very little way in proving the act done. In those cases where the

> question is, whether the deceased was of sufficient capacity to execute the will, which is acknowledged to have been executed by him, in all such cases the probability of disposition is important; but where the question is, whether the act propounded is the act of the deceased, the argument founded upon probability is of very little weight indeed, for it would be the most unsatisfactory of all reasoning, to come to a conclusion that a certain act has been done because it is not improbable that the act might have been done. The court cannot act upon any such reasoning as that."

In the foregoing decisions, it is clearly affirmed that evidence which tends to show mere *probability* of the fact in issue is not admissible.

Here the court went even beyond the matter of mere probability and admitted evidence based upon the *possibilities* which might result therefrom. In the matter of the controversy between Judge Holt and Nick Ray, the evidence was admitted over objection upon that precise ground, viz: that it might tend to show whether—

> "the testator would have allowed such a will to stand under *the possibility* that some portion of the property which would pass thereunder *might ultimately* go to the said Nicholas Ray" (Rec., p. 95).

It is clear, therefore, that the tendency of all this evidence was not to prove the fact in issue—whether Judge Holt wrote the will—but to encourage speculation and conjecture as to possible grounds for his not writing it.

The Opinion of the Court of Appeals on the Questions Arising Under the Issue of Forgery.

The opinion of the Court of Appeals recognizes the importance of this branch of the case, concedes that the contention of the caveatees is supported by the weight of authority, and without discussing the cases or the principles upon which they rest, grounds its affirmance of the

judgment on the case of Hoppe *vs.* Beyers, 60 Md. 381, as will be seen by reference to the following passages of the opinion, viz. (Rec., p. 155):

> "This brings us to the consideration of the important question . . . whether the foregoing evidence was competent for the consideration of the jury in determining the issue joined on the genuineness of the will.
>
> . . . . . .
>
> "*The contention of the appellants is supported by the citation of many cases* denying the competency of such evidence, especially the subsequent declarations of the testator on that issue.
>
> . . . . . .
>
> "But it would serve no useful purpose to occupy time with their review and the discussion of their respective weight. As the question is *one of first impression* in this jurisdiction, we are free to adopt the conclusion that seems to us to be the most reasonable, and that *accords with the smaller number of cases* relied on by the appellees."

The court then cites Hoppe *vs.* Beyers and Turner *vs.* Hand, upon which, in part, the decision in Hoppe *vs.* Beyers rests.

The ground upon which the Court of Appeals justifies ignoring the weight of decision and following the single case of Hoppe *vs.* Beyers is that in its view "*the question is one of first impression in this jurisdiction*" and that it is therefore "free to adopt the conclusion that seems . . . to be the most reasonable."

It is, of course, true that no decisions except those of this court can be absolutely binding upon the Court of Appeals, but as the question now under discussion is one of the general law of evidence and in no sense a question of local law, it is submitted, that unless clearly wrong in principle, the current of judicial decision should be respected and followed. The Court of Appeals appears to have treated the opinion in Hoppe *vs.* Beyers as having so far considered

the decisions and reasoning in conflict with its own conclusion as to render it unnecessary for the Court of Appeals to examine or consider or even notice the array of authority against the rulings which it was about to adopt, for, in speaking of the decision in that case, it says (Rec.,p. 155):

> "The Court of Appeals of Maryland, after much consideration of the principles involved, *as well as the authorities*, declared the evidence competent."

Yet an examination of the opinion in Hoppe *vs.* Beyers will show that the court not only does not give "much consideration" to "the authorities," but on the contrary that it gives them no consideration whatever. The principles and reasoning of the cases to which it refers and upon which it relies are neither applied nor stated, while there is not the slightest allusion to any adverse decision, although the exhaustive discussion in Boylan *vs.* Meeker, and the decisions in Johnson *vs.* Hicks and Hayes *vs.* West had all been reported before the opinion in Hoppe *vs.* Beyers was rendered. Indeed, there is nothing in the report of the case indicating that any adverse decision was brought to the court's attention, and as no mention is made in the opinion of any such decision, it is a justifiable assumption that the court was not aware that any existed.

Whatever the fact may be in that regard, it is undeniable that neither in the opinion in Hoppe *vs.* Beyers, nor in the opinion of the Court of Appeals in this case, is any attempt made to distinguish the cases there under consideration from those holding the contrary doctrine, nor to show that the principle upon which the adverse decisions rest is in any respect unsound.

There is, therefore, presented to this court, a direct conflict of judicial decision upon this question, with the Appellate Court of Maryland on one side and the appellate courts of seven States on the other—a conflict which it is hoped this court will deem worthy of notice.

The Court of Appeals further says (Rec., p. 155):

> "We do not mean to say that such evidence would be competent to establish the execution and existence of an undiscovered will. . . . Nor would the same evidence be of *sufficient weight* to warrant the overthrow of a formal will produced and with execution proved by *living witnesses of unimpeached credibility.*
>
> "In fact, it was said in Hoppe *vs.* Beyers, *supra*, that, under circumstances like those just mentioned, the evidence ought to be excluded. But, whether, in such event, the objection would lie to its competency or its credibility, the evidence would have so *little weight that, if admitted, the court might properly charge the jury that it could not afford support for a verdict against the will.*"

The foregoing passages of the opinion of the Court of Appeals expose the error in the conclusions reached, namely, that the absence of "living witnesses of unimpeached credibility" justifies the admission of evidence which would be otherwise inadmissible.

Can the credibility of any witness ever give to or take from evidence the quality of relevancy? If the state of mind, feeling and intentions of a testator disclosed by his acts and declarations as bearing upon the probability of his having executed a will or not are relevant to that issue, can the "unimpeached credibility" of a witness or even of a thousand witnesses render it irrelevant?

Moreover, who is to judge of the "unimpeached credibility" of the witnesses, and who is to judge of the weight of the evidence? Is the evidence to be admitted in one case because the witnesses to execution are despised and disbelieved by the judge and to be excluded in another because he considers them witnesses of "unimpeached credibility"? Or, if admitted in both cases, are the jury to be told in one case they may believe and act upon it, and in another that though admitted for their consideration they

may not believe and act upon it, according to the judge's view of the "credibility" of the witnesses or the "weight" of the opposing evidence?

It is submitted that the weight of evidence and the credibility of witnesses can never be matters for determination by the court in jury trials at common law, and the exercise of such a function would be a mere lawless usurpation of power, and the proposition that because the "evidence would have so *little weight*" after being admitted that "the court *might properly charge the jury that it could not afford support for a verdict*" is a complete subversion of the system of trial by jury, and in direct opposition to the repeated decisions of this court.

In Greenleaf *vs.* Birth, 9 Pet. 292, 298, this court says:

> "Where there is *no* evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; *but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.*"

And in C. & O. C. Co. *vs.* Knapp, 9 Pet. 541, 568, this court says:

> "The court ought not to instruct, and indeed *cannot instruct on the sufficiency of evidence.*"

This principle has also been announced by this court in equally positive terms in a long line of cases beginning in 1810.*

If this evidence be admissible upon an issue of forgery, it

*Maryland Ins. Co. *vs.* Rudden's Adm., 6 Cr. 338, 340; Crane *vs* Morris, 6 Pet. 598, 609-10-11; Ewing *vs.* Burnett, 11 Pet. 41, 50; United States *vs.* Laub, 12 Pet. 1, 4-5; Bank of Metropolis *vs.* Guttschlick, 14 Pet. 19, 30-31; Bareda *vs.* Silsbee, 21 How. 146, 166; Schuhardt *vs.* Allens, 1 Wall. 359, 370-71; Gregg *vs.* Moss, 14 Wall. 564, 569; Pleasants *vs.* Fant, 22 Wall. 116, 122; Baylis *vs.* Traveler's Ins. Co., 113 U. S. 316, 320-321; Met. RR. *vs.* Moore, 121 U. S. 558, 572-573; Russell *vs.* Post, 138 U. S. 425, 429-430; Aetna Life Ins. Co. *vs.* Ward, 140 U. S. 76, 88-89-91; Hedden *vs.* Iselin, 142 U. S. 676, 679-80.

could not become inadmissible because, in the opinion of the court the witnesses as to execution were persons of "unimpeached credibility," nor, if inadmissible, could it become admissible because in the opinion of the court the witnesses to execution were impeached, or not credible.

Had General Grant survived the testator and testified to the execution of this will he would doubtless have been believed by the jury. But if the evidence here complained of had been admitted and really tended, if true, to prove the will a forgery, upon which ground alone it could be admitted under this issue, there is no constitutional power in any court which could *compel* the jury to believe and give greater effect to the evidence of General Grant than to that of Mrs. Briggs, Mr. Barclay, Washington Holt, Charles Strothers, or the letters of Judge Holt.

The court could in such case have set aside the verdict rendered in opposition to General Grant's testimony, and it might have done this repeatedly, but it could never have compelled a jury to render a verdict to its liking.

That the Court of Appeals proceeded upon the theory that the *weight* of the evidence and the *credibility* of witnesses were questions for the court, in a case of this character upon the determination of which depended the admissibility of the evidence, is apparent from another passage of the opinion, in which the court says (Rec., p. 156):

> "By virtue of the statutory requirements in these respects, declarations before, at the time of, or subsequent to, the transaction inquired of, can not be received as *sufficient* to establish the same; nor should they be permitted to *override positive, unimpeached proof of execution.*"

If the evidence can not "be permitted to override positive, unimpeached proof of execution," why is it to be admitted at all? The court can not admit the evidence of one party to the suit as competent to maintain the issue and at the same time tell the jury they shall not give it

sufficient weight for that purpose. The jury alone, as above observed, are the judges of its weight and especially as to how far it may be "permitted to override positive, unimpeached proof" to the contrary.

Any other rule substitutes the court for the jury and renders the latter but a useless instrument of the court's will.

The Court of Appeals also speaks of the genuineness of the signatures being "assailed to *such an extent as to require the submission of the question of its forgery to the jury.*" It is not indicated by the court what amount or character of evidence would be required, but it is submitted that as the opinion of an expert or competent non-expert is all that is required to make an issue of forgery, the signature is assailed to a sufficient extent to require the submission of the question to the jury so soon as such opinion evidence is given against its genuineness.

That the supposed novelty and unprecedented character of the facts in this case had much to do with the affirmance by the Court of Appeals of the rulings of the trial judge is manifest from the following (Rec., p. 158):

> "In the *peculiar conditions of this case*, it seems to us that any evidence from which it might be inferred that the testator would, or would not, have made such a will, would be a material aid in resolving the doubt created by the other evidence whether he did or did not write and sign it."

The fair inference from this passage of the opinion is that had the facts been otherwise and the execution of the will been susceptible of proof by living witnesses, the court would have held the evidence inadmissible. This view of the opinion is strengthened by the court's frequent reference to the weight and credibility of evidence.

Yet, in the only cases by which the opinions in this case and in Hoppe *vs.* Beyers can pretend to be supported (viz., Turner *vs.* Hand, 3 Wall., Jr., 88; Taylor Will Case, 10

Abb. Pr. Rep., N. S, 300, and Johnson *vs.* Brown, 51 Texas, 65), the actual execution was proved by living witnesses of unimpeached credibility.

Indeed, in the case of Turner *vs.* Hand the fact of execution by Jonathan Meeker was proved by *five eye witnesses to the act*, three of them subscribing witnesses; and as to four of whom Mr. Justice Grier says (3 Wall, Jr., p. 113–114) their—

> "characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was impossible for them to know if not true."

And though he indicated very strongly in his charge to the jury his convictions upon the weight of the evidence, he did not pretend to deny that it was the exclusive province of the jury to weigh the evidence and decide between this "positive, unimpeached proof of execution" on the one hand, and the weight of the declarations he had admitted on the other.

It was because of this undoubted power of the jury and the consequent destruction of the security given by the statute to written and formally executed wills, among other reasons, that the Supreme Court of New Jersey, in Boylan *vs.* Meeker, declined to follow the *nisi prius* ruling of Mr. Justice Grier upon the same question arising on the same will.

The Court of Appeals in its opinion (Rec., pp. 156, 157), quotes from Mr. Justice Grier's charge to the jury in Turner *vs.* Hand, in which, to illustrate his proposition, the learned justice supposes a case. It may be freely admitted that the case supposed would occasion surprise to those knowing the situations and relations of the testator, but not knowing any explanation of his action. The case supposed, however, is not the case at bar, nor was it the case on trial before Mr. Justice Grier, but, as abundantly appears from his charge, the

illustration was used by way of contrast, to show the jury the absurdity of giving any effect to the declarations which he had admitted in evidence in the case.

Proceeding further, in line with that illustration, suppose, in that case, that there were the gravest private reasons for the disposition made, of which unhappily none of the testator's acquaintance had knowledge, the disclosure of such reasons would of course at once explain away the apparent unreasonableness of the will and entirely justify it. Yet because no one is prepared to furnish the desired explanation, and notwithstanding the compliance of the testator with all the formal requirements of law as to its execution, the jury may find that he did not execute the will. The mere conflict in the evidence as to the physical act of execution is thus held to justify recourse to another conflict of evidence as to the testator's alleged acts and declarations, and if no one happens to be living or accessible who was so far in the confidence of the testator as to know the private motive for his act, his public acts and declarations, or such as may be attributed to him, must take the place of his solemn and formal testamentary act, and the consequence is that writing, instead of a security becomes a distinct danger.

The result from this course of reasoning is that a testator is to be denied the right of disposing of his estate for purely private reasons.

Again, for purposes of illustration, another case may be supposed. For example, a man of fortune, unmarried, and without children, but with collateral relatives toward whom he sustains the warmest and most affectionate personal relations, toward whom he expresses himself in every way to justify the belief that, as the natural objects of his bounty, they will also be the actual recipients of his estate, has an illegitimate child, the offspring of an obscure person toward whom he holds no relations. And suppose, as would not be improbable, that the father of such a child

would take especial pains to conceal his paternity, and that the illegitimate child should have no knowledge of who was its father, and, that the father, acting under a sense of parental obligation, and impelled by the impulses of conscience made a will making ample provision for such a child, without caring to disclose, by declarations in his lifetime or public record after his death, the illegitimacy of the child, or his own unlawful act in begetting him. The proof of the motives or intentions by which such a testator would be actuated would be impossible. He might avail himself of the aid of counsel and of the most reputable of persons as subscribing witnesses to his will, but it would be beyond human possibility that he could insure that the witnesses should survive him to prove his will. Yet, if the doctrines in this case are to be followed, no matter how clear the proof of his signature and that of the attesting witnesses might be, if others, largely influenced by their surprise at the nature and contents of the will, and honestly incredulous, should be found to express doubt as to the genineness of the signature of the testator and of the witnesses, the writing becomes practically a nullity because the testator has not seen fit to expose to those having no legal right to know, the motives which have impelled him in his testamentary act.

One may go on indefinitely supposing imaginary cases by way of illustration, but such illustrations can not alter what the law has provided, that wills shall be made in writing, that they shall be physical and not mental acts—written, not spoken words—and that they shall be proved by evidence tending to show the doing of a physical testamentary act without reference to the relations and state of mind of the testator, where the mental capacity of the testator and his freedom from the imposition of fraud and undue influence are not involved.

The Court of Appeals also says (Rec., pp. 157–158):

"Again, we are unable to perceive a distinction in

principle between the competency of declarations in a case like this where the *fact of execution* is in question, and in one where the will is assailed as *the product of fraud and undue influence.*

. . . . . .

"The question at issue in each class of cases is practically the same: Did the testator execute the paper of his own accord? Did he execute it at all?"

The duty of counsel to point out the distinction between the two cases, if there be any, is clear and plain, and not to be evaded, although the statement, by the court, that it is "unable to perceive a distinction" makes the discharge of that duty the more delicate and attends it with hesitation and embarrassment.

It is submitted, however, that there is a distinction and it is this: Where a person of sound mind and free from the imposition of fraud or undue influence is claimed to have made a will, the right to make it from natural or unnatural motives, from good or bad impulses, upon sound reasons or no reasons, from mere caprice, or from motives of the greatest secrecy, never to be known by man, is absolute and not open to question. The reasons for making it may be put on the face of the will, or concealed from all the world. It is obvious, therefore, that in such a case inquiries as to the purposes of the testator are not only idle, but may result in the defiance and defeat of his designs. To hold otherwise at once defeats the right of a testator to make a will at variance with his expressed or apparent intentions in life, but which is based upon undisclosed motives.

But in cases of fraud and undue influence, the state of mind of the testator is of the essence of the inquiry. In those cases the claim is of *external forces*, made unlawfully to operate upon the testator and to induce or coerce his *admitted act*.

In the one case the *act* is the subject of inquiry and the motive or inducement is immaterial.

In the other, the *motive* or *inducement* is the subject of inquiry and the *act*, being admitted, is immaterial.

Moreover, in cases of fraud and undue influence, the susceptibility of the party to the imposition of fraud or undue influence and his surroundings at the time are of the highest materiality, and to show these, his acts and declarations, his situation in life and all his surrounding conditions and circumstances are direct and original evidence of the highest value and the only evidence of which the nature of the case admits.

If the jury are to hear evidence of acts and declarations for the purpose of determining the testator's state of mind and probable intentions, and to find therefrom that he did not execute the paper because its provisions are not consistent with such evidence, how can the execution of a will, designedly made at variance with public acts and declarations and based upon purely private motives, be maintained?

The distinction between the two cases is well shown in the case of Boylan *vs.* Meeker and other cases cited *supra*, no one of which, however, is examined, considered or discussed in the opinion of the Court of Appeals or in Hoppe *vs.* Beyers, upon which that opinion is based.

With reference to this same subject the Court of Appeals refers to four cases as holding the declarations of the testator as suppletory to direct proof of fraud and undue influence, admissible "upon very slight foundation of the direct proof first required" (Rec. p. 158).

Without noticing the irrelevancy of such cases to the question under discussion, it may properly be said that in two of the cases cited, (Stephenson *vs.* Stephenson, 62 Iowa, 163, and Parsons *vs.* Parsons, 66 Iowa, 754), the reports do not show what evidence was offered as a foundation, and there is no means therefore of judging whether the foundation was strong or slight, but it does appear that the issue of *mental capacity* was presented in each case, which alone would have justified the admission of the declarations. In the other two

cases (Lane *vs.* Moore, 151 Mass. 87, and Woodbury *vs.* Woodbury, 141 Mass. 329) it is submitted that the strongest kind of a foundation was laid. Both were cases of gifts *inter vivos*, by donors over eighty years of age, feeble in body and mind, and the donees were their confidential agents and advisors (in one case, physician as well). In these cases therefore, the gifts were, from the facts, *prima facie* fraudulent in law, and the burden was on the donees to show the contrary. It can hardly be said that such cases present "slight foundation of the direct proof" of undue influence.

The Court of Appeals instances the cases of the Will of Cottrell, 95 N. Y. 329; Beadles *vs.* Alexander, 9 Baxter, 604, and Adams *vs.* Norris, 23 How. 353, as sustaining the admission of declarations of the testator as suppletory proof of the formality of legal execution.

In the first case (Will of Cottrell, 95 N. Y.), the will was holographic, and the attestation clause was also in the handwriting of the testator.

The attesting witnesses denied their signatures, but experts testified that they were genuine. The case had been tried before the surrogate on the law and facts, and the Court of Appeals of New York expressly disclaims ruling upon the admissibility of evidence, saying (p. 333):

> "We look into the evidence given on the trial only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the trial court."

The court shows that his findings are amply supported by the facts in evidence independently of any alleged declarations of the testator. What the declaration was does not clearly appear; the only thing in the report of the case on that subject being a brief reference in the opinion, where the court says (p. 337):

> "The testator declared during his last sickness that the will executed as he had described it was

> either among his papers or that he had given it to his executor."

The ground upon which the declaration was received, however, is clear. The court holds (p. 339) that evidence tending to show that the person superintending the execution of the will knew the requirements of law as to the formalities of due execution, is admissible to support the presumption of due compliance with law arising from an attestation clause asserting such compliance, and the declarations of the testator, together with the fact that he himself wrote the attestation clause, would, of course, tend to show such knowledge.

The case of Beadles *vs.* Alexander, 9 Baxter, has already been discussed (*supra*, p. 164). The declaration in that case was purely a narrative of a past event, and as such was the plainest hearsay.

The case of Adams *vs.* Norris, 23 How., was an ejectment suit brought to this court by writ of error to the Circuit Court for the District of California, and the question was as to the valid execution of a codicil under the Spanish law and local customs as in force in California at the time (1845).

As appears from the opinion by Mr. Justice Campbell, the codicil was in the Spanish language (p. 356), and the genuineness of the signatures of the testator and of the witnesses was established "by the admission of the plaintiff" (p. 357).

The declaration of the testator put in evidence was that shortly before his death the testator had—

> "informed a witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew" (p. 357)—

which correctly stated the substance of the codicil.

It does not appear that this declaration was objected to, but it was plainly admissible as showing the testator's

knowledge of the existence and contents of the codicil; in view of its being in the Spanish language, this was especially material, it not appearing that the testator, who was a naturalized Mexican, understood that language.

The ground of its competency is thus stated by Mr. Justice Campbell (p. 368):

> "As suppletory proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony."

Thus it will be seen there is nothing in any one of these cases which throws any light upon the question of the admissibility of evidence tending to show the state of mind, feelings or intentions of the testator to disprove the act of execution; but in each of the cases the declarations admitted tended to show knowledge on the part of the testator of the existence and contents of the instrument, and therefore to identify it as his act.

Upon the whole, therefore, it is submitted, that a careful analysis of the opinion of the Court of Appeals on this branch of the case shows that opinion to be without other support than the case of Hoppe *vs.* Beyers, itself wholly unsupported and opposed to all authoritative decisions on the subject; and further, that the reasons advanced by the Court of Appeals for the affirmance of the judgment below are unsound, and such as ought not to receive the sanction of this court.

This concludes the discussion of the two principal question which, as was stated at the opening of this brief, had never before been presented in this court, and the correct decision of which is of such far-reaching consequence, and leads to the consideration of the errors assigned as to the other rulings at the trial.

Evidence of Opinions Based on the Style and Composition of the Paper in Controversy and the Etiquette to be Observed by Judge Holt Toward his Superior Officers.

The rulings of the court embraced under this head, covered by the ninth, tenth and twelfth assignments of error, relate to the admission in evidence of opinions of witnesses upon matters which, it is submitted, are not the proper subject of opinion testimony, followed by the exclusion of similar evidence offered in rebuttal, and the instruction to the jury in regard to the same.

In support of the claim of forgery counsel for the caveators offered the testimony of Colonel Barr as to the legal attainments of Judge Holt and his grammatical and rhetorical style of composition, to the effect that Holt was the finest rhetorician witness ever saw; that witness had the highest respect for Holt's abilities as a lawyer and that Holt undoubtededly knew that the term "inherit" did not apply to a person taking under a will (Rec., p. 29). The witness was also asked and permitted to testify as to his opinion of Holt's manner towards men in such situations as General Grant and General Sherman, for the purpose of showing that it was improbable he would have asked persons in their positions to witness his will, because it would have been an impropriety for him to do so if he entertained a proper sense of what was due to his superior officers; the witness in this connection describing Holt as a man of retiring modesty. The court permitted this testimony to be given as proof of forgery under the explanation and for the purpose indicated by counsel for the caveators as above stated (Rec., pp. 30–31).

The court also admitted in evidence under this issue the testimony of Mrs. Briggs, to the effect that in her opinion the will in controversy was not written by Judge Holt, both because of the writing and of the style of composition, in fact "more the composition" (Rec., pp. 40–42). And she

was permitted generally to describe his grammatical and rhetorical style of composition, as competent evidence on the issue of forgery (Rec., p. 42).

The court also admitted in evidence as competent to prove forgery, the testimony of William Winthrop, who had practiced law from 1854 to 1861, as to the witness' opinion of Holt's ability as a lawyer, and as to Holt's grammatical and rhetorical style and permitted him to express his opinion, based upon "the handwriting and the composition, style, and punctuation of the whole paper," that Holt was not "the producer of that document" (Rec., p. 43), and also that from his "knowledge of Gen. Holt's characteristics and his way of expressing himself," he would not have used the word "inherit" in the sense it is used in the will in controversy (Rec., p. 44).

It is to be observed that Mrs. Briggs was not a lawyer nor did she pretend to any familiarity with or knowledge of the style of composition appropriate to testamentary papers in general, nor to any knowledge whatsoever as to Holt's "style" in such matters, if, indeed, he had any, and of which we have a somewhat astounding example in the Record (Rec., pp. 44–47).

Mr. Winthrop, though a lawyer, does not pretend to a familiarity with Holt's "style" in respect to writing testaments, and it is safe to surmise he would have given different testimony had he seen many such examples as the will of 1848 to which reference is above made.

Indeed, an examination of the "style" and "composition" and legal training exhibited by that document suggests that Judge Holt might have truly said with Suffolk in Henry VI (Pt. 1, Act II, Scene 4):

> "Faith, I have been a truant in the law,
> And never yet could frame my will to it;
> And, therefore, frame the law unto my will."

It is submitted that in this evidence the caveators created

an entirely new field of expert or opinion testimony, not before recognized by the courts, and it is not surprising that untried and inexperienced persons were recruited for the purpose.

Striking illustrations of the impropriety of such testimony is found in the evidence of these witnesses. For instance, as to the word "inherit" it was necessary for the witnesses first to assume that the use of the word was improper, and then to assume that Holt so considered it, and for that reason would not have used it. Yet the use of the word "inherit" as employed in this will is not so clearly open to condemnation as counsel and witnesses seem to assume. It is not an Anglo-Saxon word, belonging to the language of the common law, but is from the old French "*enheriter*," belonging to the language of the civil law, and the ordinary signification of the word is not confined by lexicographers to taking by descent (see Worcester's, Webster's and the Century Dictionaries), while the word "inheritance," as used in the civil law, is thus defined by Bouvier:

> "The succession to *all* the rights of the deceased. It is of two kinds: *that which arises by testament when the testator gives his succession to a particular person*; and that which arises by operation of law, which is called succession *ab intestat*."
>
> See to the same effect Black's Law Dictionary—Tit. "Inheritance."

That the sense in which this word is used in the will in controversy is by no means unusual appears from a recent case, Shapleigh *vs.* Shapleigh, 44 Atl. 107 (July 28, 1899) [not yet officially reported], where the Supreme Court of Vermont construed a will containing the following clause:

> "Sixth. I give and bequeath to Marion T Shapleigh, widow of my deceased brother, Fred. R. Shapleigh, the proportion coming to me as heir of said Fred. R. Shapleigh in his estate."

The testator was a legatee and devisee of Fred., and also his executor.

Chase, J., for the court says (p. 108):

> "He [the testator], must have used the word 'heir' not in its technical but *in its most general sense*, as indicating the person upon whom property devolves on the death of another, either by law or by will. Cent. Dict."

It cannot therefore be said to be so glaringly bad an expression as used in the will, especially as Judge Holt's duties as Judge Advocate General and Chief of the Bureau of Military Justice would certainly have tended to keep him in touch more with the civil, than the common law.

In addition to this illustration the Record discloses one of these experts (Mrs. Briggs) declaring Holt's "style" to be a model of terseness—"Never a word that the sentence could be made complete without"—(Rec., p. 42), and another (Mr. Winthrop), alliteratively telling the jury it was "formal, florid and flowery" (Rec., p. 44), and that he "used no superfluous words but illustrated a good deal," while the third (Colonel Barr) makes him "the finest rhetorician," given to "using a full share of commas" (Rec., p. 29).

Counsel have been able to find but one case in which a witness was asked for his opinion based upon the style of composition of a writing, where its authorship was in issue, and in that case the Court of Appeals of New York held such a matter not to be a proper subject of opinion testimony.

In Lee *vs.* Bennett, Howard's App. Cas. 187 (1847), one Lee sought to recover from the defendant, the proprietor of the "New York Herald," the value of services he claimed to have performed as reporter. The plaintiff alleged that a certain report of a trial which was published in defendant's newspaper had been written by him, and, in support of his authorship of the report in question, produced as a witness a newspaper reporter, who was shown a printed copy of the

article, and was asked, "From that printed copy can you state whose reports they were?" This was objected to and the objection sustained (pp. 188–9) and judgment was rendered for the defendant.

The judgment was removed into the Superior Court by *certiorari*, and was there reversed, that court holding this evidence to have been competent (pp. 191, 194–5). A writ of error was sued out, bringing it to the Supreme Court, which reversed the judgment of the Superior Court and held the question to have been improper (p. 191), and that judgment was finally affirmed by the Court of Appeals (p. 202).

Seven of the eight judges held evidence of the opinion of the witness based on the style of the paper to be inadmissible, Jewett, C. J., delivering the opinion, which is not reported.

The reporter's note at the end of the case, summarizing the opinion of the chief justice, reads in part (p. 202):

> "The rule which requires witnesses to testify to facts from knowledge and not from belief justified the decision of the justice in excluding the question put to the witness Doyle, to wit: 'From that printed copy can you state whose reports they are?' There are exceptions to this rule. On questions of skill and judgment, men of science and experience are allowed to give their opinion in evidence [Lincoln *vs.* RR. Co.], (23 Wend. 425). But this does not come within any exceptions to the rule."

See particularly the argument of Messrs. Galbraith and Edward Sandford for defendant (pp. 195–197), in which they say this is the first time such evidence has ever been offered.

> See, also, Lawson on Expert and Opinion Evidence (1883), 167.

It is not easy to imagine where, if ever, litigation would end, were it once established that this realm of investigation is proper upon an issue of forgery. Certain it is that

few men would have the genius to combine in their testamentary papers all the vagaries of "style" attributed to them by all their acquaintances, yet if the evidence in the Record in this case be competent, such would seem to be necessary to insure the validity of their wills.

The peculiar official relations of the testator with the witnesses to the paper propounded, it is submitted, were not matters which justified the introduction of opinion testimony as to what might have been the proprieties or whether or not Judge Holt was a man who would have observed a particular standard of propriety.

In the case of Spence *vs.* Spence, 4 Watts. (Pa.) 165 (1835), an inquiry as to the relations of the testator with one of the subscribing witnesses to his will where fraud and conspiracy on the part of that witness was charged, was excluded by Chief Justice Gibson.

In that case, on an issue of *devisavit vel non*, defendant proposed to prove that testator disliked one of the subscribing witnesses. This was objected to and the objection sustained.

On appeal this ruling was affirmed, Gibson, C. J., delivering the opinion, saying (p. 166):

> "The relevancy of the fact is not perceived. The witness had pretended to no intimacy with the testator; but had testified that, happening to be on the spot, he was requested by him, in the urgency of his approaching dissolution, to correct certain blunders of the scrivener in respect to names; and that his corrections were supervised by the testator, who re-examined the paper before he signed it. Such an agency is consistent with want of confidence in the agent; and as the evidence neither contradicted the witness nor indicated the supposed confederacy it was properly excluded."

Ramadge *vs.* Ryan, 9 Bingham, 333 (1832), was an action of libel against the editor of a journal, in which had ap-

peared an article stating that a certain reputable physician had refused to enter into consultation with the plaintiff, also a physician, and that in so doing he had "honorably and faithfully discharged his duty to his medical brethren." On the trial defendant's counsel proposed to call an eminent surgeon, and ask him whether he would meet the plaintiff in consultation, and also whether in refusing to consult with the plaintiff, the physician, whose conduct was commented upon in the article in question, had faithfully discharged his duty to the medical profession. The Chief Justice (Tindal) held such evidence inadmissible, and the jury returned a verdict for the plaintiff.

On a motion for a new trial, it was contended that this testimony should have been received (p. 335)—

> "upon the same principle as the opinion of scientific men on matters of science . . . because the jury must be ignorant of the conventional rules and etiquette established in each profession, which can only be known, or only accurately known, by members of such profession."

Tindal, C. J., in refusing to grant a new trial, says (p. 335):

> "Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted. If in this case any specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question here was, whether a physician, in refusing to consult with the plaintiff, had honorably and faithfully discharged his duty to the medical profession. The answer to that might depend altogether on the temper and peculiar opinions of the individual witness, and was a point on which the jury were as capable of forming a judg-

ment as the witness himself. On this ground, therefore, there is no reason for granting a rule for a new trial."

This court has announced the same doctrine in Milwaukee and Saint Paul R.R. Co. *vs.* Kellogg, 94 U. S. 469, where Mr. Justice Strong says (p. 472):

"A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

"This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus, it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, Keller *vs.* Railroad Company, 2 Abb. (N. Y.) App. Dec. 480; or whether it was prudent to blow whistle at a particular time, Hill *vs.* Railroad Company, 55 Me. 438. Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. Muloy *vs.* Insurance Company, 2 Gray (Mass.), 541. In Durell *vs.* Bederly, Chief Justice Gibbs said: 'The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium,

> is not admissible in evidence.' Powell's Evid. (4th Ed.) 103. And in Campbell *vs.* Richards, 5 Barn. & Ad. 846, Lord Denman said: 'Witnesses are not receivable to state their views *on matters of legal or moral obligation nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than in another.*' See, also, Lord Mansfield's opinion in Carter *vs.* Boehm, 3 Burr. 1905, 1913, 1914, and Norman *vs.* Higgins, 107 Mass. 494, in which it was ruled, that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land was inadmissible."

Both the question of style and that of etiquette were in the nature of matters of "common observation," and the jury, with the necessary facts before them, were quite as competent to form opinions thereon as could be any other person—indeed, as to the style and composition of the will in controversy, far better qualified, having before them two admittedly genuine wills drawn by Judge Holt, than any of the witnesses who testified as to their opinions, none of whom claimed to have seen an example of Judge Holt's testamentary style.

The error committed in admitting this testimony is emphasized and the injury done the caveatees was aggravated by the peculiar and extraordinary rulings of the trial court with reference to this class of evidence at different stages of of the trial.

Upon the cross-examination of the Hon. Robert R. Hitt, a witness produced by the caveatees in their case in chief, the caveators asked that witness whether, upon looking at the phraseology of the will in controversy, he found "there any of the characteristics of Judge Holt in the composition of that paper" (Rec., p. 26). This was objected to

by the caveatees, and after full argument (Rec., pp. 26–28), the court sustained the objection. Immediately upon this ruling the caveatees closed their case (Rec., p. 28). Subsequently, upon the examination of Mrs. Briggs, produced by the caveators in their case in chief, the witness was asked about Judge Holt's style of composition. This was objected to, and, at the court's suggestion, the matter was re-argued (Rec. p. 41), and the court changed its ruling (Rec. p. 42) and admitted her evidence on this subject, and also that of Colonel Barr and Colonel Winthrop, as above noted. Upon the close of the caveators' case the caveatees produced John A. Bingham and attempted to rebut this evidence introduced by the caveators, whereupon objection was promptly made by the caveators and the evidence was excluded by the court *on the ground that it should have been offered in chief* (Rec., pp. 104–108).

The caveatees were prohibited from introducing this evidence in chief, had they desired to do so, by the ruling then made, and when, subsequently, they sought to rebut the evidence introduced by the caveators under the changed ruling of the court, they were again prohibited and told they should have offered it at the time the court originally held it inadmissible.

Counsel for the caveators afterwards seemed to recognize the inadmissibility of evidence of opinions based upon the style of composition, and, at the close of the trial, requested the court to instruct the jury to disregard them.

The Error in Admitting Opinion Evidence Was Not Cured by the Subsequent Instruction to Disregard.

It is conceded that, where, in the course of a trial, illegal evidence has been admitted and the court subsequently recognizes that fact and withdraws such evidence from the consideration of the jury, as a general rule, the error originally committed is cured. This is established by many au-

thorities in this court, which, however, recognize exceptions to the rule in those cases where the incompetent evidence, from its nature or the manner of its submission, has so affected the jury that that its injurious consequences can not certainly be removed by the subsequent action of the court. This case, it is claimed, comes within such exception to the general rule.

The evidence of the opinions of witnesses founded upon Judge Holt's style and composition was placed before the jury early in the trial (Rec., pp. 40–42). After the question of its admissibility had been twice elaborately argued (Rec., pp. 26–28, 40–42), at a subsequent stage of the trial, this matter was again brought to the attention of the jury upon the caveatees offering to rebut the testimony admitted (Rec., pp. 104–107), and was again fully argued. It will thus be seen that the subject was given great prominence during the course of the trial, was earnestly insisted upon by counsel for the caveators and earnestly opposed on behalf of the caveatees. The jury were, therefore, in effect, advised that this matter was one of great importance and this testimony must have made a correspondingly deep impression on their minds. The trial lasted five weeks—from May 18 to June 25, 1896—and during most of this time the jury had before them, strongly and repeatedly impressed upon their minds, this incompetent evidence. When the case was finally closed, the caveators, recognizing the inadmissibility of this evidence, sought to relieve themselves from the responsibility for its introduction, and, in their eighth prayer (Rec., pp. 120-121), in effect requested the court to direct the jury to disregard any opinions as to whether Judge Holt wrote the will in controversy, based, in whole or in part, upon the composition of the paper or the expressions contained therein. This was granted, over objection and exception of the caveatees, and the court in its final charge when reading this prayer to the jury introduced it by saying (Rec., p. 130):

> "The court has granted, at the instance of the caveators, the prayer numbered eight, which I will read to you in this connection."

It will be observed that the jury were not told that this was illegal or incompetent evidence, not proper for their consideration, and that, therefore, it must be disregarded, but the remark of the court above quoted leaves open the inference that the trial justice regarded this evidence as competent, and only withdrew it from the jury as matter of grace and favor to the caveators. The manner of its withdrawal, then; the prominence given to this evidence throughout the trial; the earnestness with which its admissibility was pressed by counsel for the caveators; the fact that before its withdrawal the caveatees were not permitted to rebut it; and the length of time this evidence remained before the jury, all combined to make its impression upon their minds so strong, that, it is submitted, the error committed in admitting it was not cured by their being told to disregard it. In considering this question it must be remembered that the case was a close one, from its nature doubtful and difficult, and therefore one in which any erroneous ruling might be of the most vital consequence to either party.

This case, then, is far different from any of those in which this court has held the erroneous admission of evidence to have been cured by its subsequent withdrawal.

In Specht *vs.* Howard, 16 Wall. 564, the evidence was withdrawn during the course of the trial immediately after it had been admitted and before it could have had any influence upon the minds of the jury.

In Pennsylvania RR. Co. *vs.* Roy, 102 U. S. 451, the jury were clearly told the evidence was incompetent; and, furthermore, under the instructions of the court as to the measure of damages, the illegal evidence could not have influenced their verdict, for they were expressly told that they should assess damages on the basis of the decrease of the plaintiff's

earning capacity and not upon the basis of his former or present pecuniary condition.

In Hopt *vs.* Utah, 120 U. S. 430, the evidence was stricken out directly after it had been admitted, and the jury were unqualifiedly directed that "they were not to consider it at all."

In N. Y., L. E. & W. RR. Co. *vs.* Madison, 123 U. S. 524, the court not only twice directed the jury to disregard the evidence, but in most unqualified terms told them it had been "improperly admitted."

In Texas & Pacific Rwy. Co. *vs.* Volk, 151 U. S. 73, incompetent evidence was admitted in support of a claim for exemplary damages. The jury were directed that they could not find exemplary damages, and by their verdict expressly assessed actual damages. All testimony in support of the claim for exemplary damages thus became wholly immaterial, and any error committed in its admission was cured by the verdict.

The distinction between all these cases and the one at bar is plain. This case, it is confidently submitted, falls within the exception instanced by Mr. Justice Field in Hopt *vs.* Utah, *supra*, where such an impression has been made upon the minds of the jury by illegal and improper testimony that "its subsequent withdrawal will not remove the effect caused by its admission;" and, therefore, the original objection must prevail on this writ of error.

As instancing the exceptions to this rule, the following cases are cited.

In Washington Gas Light Company *vs.* Lansden, 172 U. S. 534, as in the case of the Texas & Pacific Rwy. *vs.* Volk, *supra*, the evidence was only admitted in support of the claim for punitive damages, the court, however, having failed to direct the jury specifically that the testimony was incompetent, it was held that the original error in admitting it was not cured by the mere instruction to the jury that punitive damages could not be awarded.

Waldron *vs.* Waldron, 156 U. S. 361 (1894), was an action by a wife for damages for the alienation of her husband's affections. On the trial plaintiff attempted to introduce the record of previous divorce proceedings between herself and her former husband for the general purposes of the case. The court, however, admitted this record only to prove the fact of the divorce, and "repeatedly declared that it could only be used for that one purpose" (p. 364). Plaintiff's counsel, however, in their closing argument disregarded the rulings of the court with reference to the purpose for which the record of the divorce proceedings had been admitted.

In its final charge after the conclusion of the arguments to the jury the court again clearly and specifically instructed the jury as to the purpose for which the record of these divorce proceedings had been admitted, and directed them to limit their consideration thereof solely to the point it was to prove, namely, the fact of a decree of divorce having been granted.

Mr. Justice White, speaking for the court, says (pp. 382–383):

> "We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. State *vs.* May, 4 Dev. (Law), 330; Goodnow *vs.* Hill, 125 Mass. 587, 589; Smith *vs.* Whitman, 6 Allen, 562; Hawes *vs.* Gustin, 2 Allen, 402, 406; Dillin *vs.* People, 8 Michigan, 357, 369; Specht *vs.* Howard, 16 Wall. 564. There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it

must have affected the minds of the jury despite the correction by the court."

He then quotes from Hopt *vs.* Utah, 120 U. S. 438, and continues: "The case here, we think, comes within the exception."

In that case, then, the court not only limited the purposes for which the record of the divorce was admitted, but in the course of the trial "repeatedly declared that it could only be used for that one purpose," and, in its final charge again specifically pointed this out. And here, in spite of all these instructions by the trial court, most clear and positive, this court held the original error not to have been cured, that the effect of the evidence on the minds of the jury was not removed by the instruction to disregard, and that the case fell within the exception indicated in Hopt vs. Utah.

In Erben *vs.* Lorillard, 19 N. Y. 299 (1859), Denio, J., says (p. 303):

> "The judge at the trial allowed the plaintiff to give evidence of the value of the lease, which the defendant agreed to give him, overruling, at the time the defendant's objection to the evidence; but he reconsidered this ruling when he came to charge the jury, and instructed them to disregard the proof respecting the lease, and give the plaintiff only the actual value of the services. But if the first decision was wrong, the error was not cured by the subsequent direction."

Grover, J., speaking of the effect of this evidence, says (p. 302):

> "The plaintiff's counsel insists that this (if error) was cured by the charge. When illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error can not be disregarded. The rights of parties can

only be preserved by adhering to this rule. It would be vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are impaneled. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence. A juror is never made competent by the direction of the judge to disregard any opinion he had formed previous to taking his seat. Such direction has never been thought sufficient to protect a party from its effect. An opinion derived from illegal evidence upon the trial would be equally prejudicial. The judgment should be reversed."

O'Sullivan *vs.* Roberts, 39 N. Y. Superior, 360 (1875), was an action to recover for services in going to Mexico at the defendant's request. On the trial, the plaintiff stated he was taken ill in Mexico, and was then asked what expense he was put to by his illness. The court permitted him to answer over defendant's objection. The case was heard before Sedgwick and Speir, JJ., the latter delivering the opinion, both concurring. He says (p. 370):

"I am of opinion that this testimony was clearly inadmissible. Under any aspect of the case was it proper? No obligation whatever obliged the defendant to pay the expenses of the plaintiff's sickness at Orizaba, and the answer was calculated to awaken the sympathies and arouse the prejudices of the jury. Plaintiff's counsel contend that the error was cured by the court directing the jury to disregard this testimony and ordered it to be stricken out. *But the testimony was given at the commencement of the trial, which lasted three or four days, and the order to disregard it and strike out was at the close, when the judge charged.*

"The evidence had already had its effect upon the jury, and we cannot say their jugments were not influenced. The cases of Anderson *vs.* The Rome, W. & O. RR. Co., 54 N. Y. 334, and Erben *vs.* Lorillard,

19 N. Y. 302, are clearly against the admission of this testimony."

In Furst *vs.* Railroad Co., 72 N. Y. 542 (1878), an action for personal injuries sustained by being run over by one of defendant's cars, the plaintiff introduced evidence to show that the conductor had made certain statements to the witness, after the time of the accident. Rapallo, J., for the court says (p. 546):

"After repeated objections to the questions put to the witness Furst had been made and overruled, he answered that the conductor told him that he thought the driver did not look, or the child would not have been run over. The plaintiff's counsel then proposed to have the answer stricken out, it appearing from the answer that it was merely matter of opinion. The defendant's counsel declined to accept this proposition, and elected to retain his exception. The court made no ruling and gave no instruction to the jury on the subject. The former rulings, the exceptions thereto and the objectionable testimony all remain in the case.

"The defendant's counsel had the legal right after the evidence had been admitted, in spite of his repeated objections, to insist upon his exception, and it was not his duty to waive it, as he would have done by accepting the proposal of the plaintiff's counsel. So far as the jury might be influenced by the incompetent evidence, the mischief was already done, and would not have been repaired by the agreement of counsel to strike it out."

. . . . . .

(P. 547). "The questions asked of the witness were manifestly improper in any point of view, the objections were repeated every time they were changed in form, and when at last the answer was drawn out, the counsel had a valid exception.

. . . . . .

"It having been got into the case in spite of these efforts, the counsel would have been remiss in his duty to his clients, if he had consented to waive his

> exception, under such circumstances that the mischief would not be fully repaired. The offer of the plaintiff's counsel, if accepted, would not have caused the jury to overlook this evidence, when they came to consider the case, and it is impossible to say that it did not have some influence upon them."

Certainly one party to a litigation should not be permitted to trifle with the rights of his adversary in this way. He has the right to insist upon the admission or exclusion of evidence, according to his judgment as to its competency, but his adversary has the correlative right to have the mischief corrected if the ruling be erroneous, and to permit such a course as was pursued in this case, it is submitted with all respect to the court and counsel, would be to establish a precedent for a very unjust procedure in trials.

The Ruling of the Court of Appeals on the Opinion Testimony.

The opinion of the Court of Appeals upon this subject (Rec., pp. 159–160) in effect holds: First, that the order of the introduction of evidence having been discretionary with the trial court, the exercise of this discretion in rejecting Colonel Bingham's evidence offered in rebuttal should not be disturbed; and, secondly, if there was error in the admission of the opinion evidence, such error was cured by the subsequent instruction to the jury to disregard it, for the reason that the state of facts in this case does not come within the exception to the general rule above noticed.

The court refrains from deciding whether or not the evidence of the opinions of the witnesses based upon the style and composition of the paper was admissible, confining its decision solely to the ground that the conditions of this case were not such as to bring it within the exception indicated in Hopt *vs.* Utah and Waldron *vs.* Waldron, *supra.*

Speaking of the evidence of Colonel Bingham offered in rebuttal, the Court of Appeals says (Rec., p. 160):

> "It will be remembered that when caveatees first closed their case they were admonished by the court that the rule in respect of rebuttal evidence would be rigidly enforced; and that they thereupon withdrew the announcement and examined a number of witnesses whose opinions were that the will and signature of testator were genuine. *It does not appear that there was any reason why this witness could not have been called on the matter of handwriting, simply, in the opening.*"

There was no reason why Colonel Bingham could not have been called to testify to the handwriting of the paper when the caveatees were making out their case in chief. They established their *prima facie* case by calling several witnesses as to the handwriting of Judge Holt and of the subscribing witnesses. Colonel Bingham was not called to testify as to the handwriting simply, but as will be seen upon reference to the question asked him (Rec., p. 105), to which the caveators objected, it was sought to elicit his opinion from his knowledge of Judge Holt's handwriting, "manner of composition and general attainments," all taken together, whether the paper was written by Judge Holt or not. This was clearly responsive to the evidence of opinions introduced on behalf of the caveators notably that of Mrs. Briggs and Colonel Winthrop given when the court first changed its rulings (Rec., pp. 41–43), and was offered to rebut the same. The reason this evidence could not have been offered by the caveators in their case in chief and which seems to have escaped the notice of the Court of Appeals though plainly disclosed by the Record was that just before they closed their case the court ruled (Rec., p. 28) in connection with the testimony of Mr. Hitt that such evidence was "not a matter for an expression of opinion by an ordinary witness." It is somewhat remarkable that the Court of Appeals should have failed to note this fact which makes pointed and evident the disadvantage under which the caveatees labored in respect to this evidence.

The effect of the Court of Appeals decision, therefore, is to hold that the circumstances of this case are not such as to bring it within the exceptions to the general rule that an instruction to the jury to disregard incompetent evidence cures the error in admitting such evidence—a position which it is confidently submitted, is entirely erroneous.

THE QUESTIONS OF REBUTTAL EVIDENCE.

The Twelfth and Thirteenth Assignments of Error.

The caveators offered the testimony of John B. Randolph, who claimed to be familiar with the signature of General William T. Sherman, and expressed it as his opinion that General Sherman's signature on the will was "a passably good imitation" (Rec., p. 85); "that in his opinion the said signature to the will was not in the handwriting of General Sherman" (Rec., p. 86); "that in the genuine signature of General Sherman, in the long quirl to the capital T, the upper and lower line met; witness never saw one in which they did not meet, and he had seen thousands of them" (Rec., p. 86). The fact that the upper and lower line in the quirl to the letter "T," in this will, did not meet was one of the witness' reasons for thinking this signature a forgery (Rec., p. 86).

The caveatees offered the testimony of General Sherman's son, P. Tecumseh Sherman, in rebuttal, to show that the peculiarity in the letter "T" in the signature to this will, which Randolph thought indicated forgery and declared did not exist in the genuine signature, "was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature" (Rec., p. 103). And they also offered the testimony of Mr. Sherman, in further rebuttal of Randolph, to show that certain other specified features of the signature of General Sherman to the will which Randolph gave as reasons

for his opinion that it was a forgery, were of frequent occurrence in the genuine signatures of General Sherman; but upon objection of the caveators that this should have been offered in chief, all this testimony was excluded (Rec., pp. 101–104).

These features of the signature of General Sherman had never been alluded to in the testimony before that of Randolph was introduced. Randolph was the only witness offered to impeach the genuineness of the signatures of General Grant and General Sherman.

It was very important, because, if the signatures of General Grant and General Sherman were believed by the jury to be genuine, that would undoubtedly have been sufficient to overcome all the adverse testimony of every character in the case, and to establish the genuineness of the will.

It was only upon Randolph's cross-examination that it was discovered upon what he based his opinion. When it was disclosed that he based his opinion upon certain specific things, it was then competent, and for the first time became material, to show that he was mistaken and that the genuine signatures contained the very features which led him to declare this one to be a forgery.

That this was proper rebuttal evidence is clear upon plain principles of fairness and common sense and is sustained by judicial authority.

In the case of Wentworth *vs.* Railroad Co., 143 Mass. 248 (1887), it became material to know whether a certain gas-jet had been lit on a particular evening. Two witnesses for defendant testified it was, but, on cross-examination, stated they had no particular memory of the night in question, but that it was the uniform custom for that burner to be lit every night. The plaintiff, over objection, showed by witnesses who visited the place, after the night in question, that this burner was often unlit.

Morton, C. J., affirms the ruling of the court below on this point, saying (p. 249):

> "It seems to us that the course of the defendant at the trial was such as to make the question whether there was such a uniform practice or custom a material one, at least to the extent that the plaintiff might be permitted to contradict the witnesses by showing that there was no such practice. The defendant introduces a witness who swears positively to an important fact. Upon full examination it turns out that he can swear to this fact only as an inference from the existence of another fact, namely, that of a practice always to light the gas-burner in question, which he alleges to be true. We think the plaintiff may be permitted to show that the fact of such practice, which is the source and basis of the knowledge of the witness, from which he infers the main fact does not exist and is not true, without violating the rights of the defendant. It tends to contradict the witness and to show that his testimony in chief is not to be relied on."

In the case of Com. *vs.* Leach, 156 Mass. 99 (1892), the defendant was charged with producing an abortion. The prosecution produced experts to show that no woman could introduce a "sea tangle tent" into her uterus, and the trial court excluded evidence offered on behalf of the defendant to prove by a witness that she, the witness, had introduced such an instrument into her own uterus. Allen, J., held the exclusion of this evidence to have been error, saying (p. 102):

> "Where the testimony to be met is the opinion of expert witnesses that it is impossible in the nature of things for a particular thing to be done it is not necessary to rely on expert opinions to the contrary if it can be shown as a matter of fact that the thing has been done."

Railway Co. *vs.* Falvey, 104 Ind. 409 (1885), was an action against a railroad company for damages for personal injuries sustained at the hands of the company. One of defendant's witnesses was asked how old he thought plaintiff was. He replied 23 to 25 years. On cross-examination he

was asked the age of a bystander, which he placed at 55. In rebuttal plaintiff called this bystander, who testified his age was 46.

Elliott, J., delivering the opinion, says (p. 423):

> "It was competent for the appellee to prove that Applegate's opinion was of little or no value, because of his incapacity to correctly judge of a person's age. . . . The testimony was not irrelevant."

He then quotes Steph. Ev., Art. 50, and says (p. 424):

> "The reason for this rule is that it is proper to test the capacity of the witness and to ascertain the reasonableness or establish the unreasonableness of his opinion. Folkes *vs.* Chadd, 3 Doug. 157."

In S. A. & A. P. Rwy. Co. *vs.* Robinson, 79 Tex. 608 (1891) which was an action for personal injuries caused by the wrecking of a train on appellant's road, Gaines, J., says (pp. 609–610):

> "Upon the trial which resulted in this appeal, the plaintiff, who is appellee here, in order to sustain the allegations of his petition, adduced evidence tending strongly to show that as a result of the injuries received in the accident, his sexual powers had been greatly impaired, if not destroyed. To meet this, the defendant introduced testimony to the effect that, a short time before the trial, he had been caught in the act of sexual intercourse with a woman not his wife. In order to rebut this testimony he offered to prove by a witness, who was his wife at the time of the accident, but who had subsequently been divorced, that before his injuries he had been a man of great sexual vigor, but that afterwards he was impotent. The testimony was objected to on behalf of defendant, upon the ground that, being cumulative upon the evidence introduced by plaintiff, in chief, the offer came too late. The testimony was admitted and in its admission there was no error."

So, also, Gillett in his work on Indirect and Collateral Evidence says (Sec. 61):

> "While, as we have already seen, it is not competent for the party calling an expert to show by him particular instances in his own experience confirming, or tending to confirm, the opinion he has expressed, for the reason that such evidence would be collateral, yet the opposite party may introduce evidence of particular instances opposed to such opinion, for the reason that such evidence tends to overthrow the opinion."

Counsel are unable to reconcile this ruling of the court with that embraced in the twenty-fourth exception covered by the thirteenth assignment of error by which the caveators were permitted to offer the testimony of Martha Scott in surrebuttal (Rec., pp. 118–119).

Martha Scott had testified (Rec., p. 84), that Miss Throckmorton *never* went to Judge Holt's house "on any occasion accompanied by a white servant named Anna Tulley, *nor by any other person whomsoever.*"

In rebuttal Anna Tulley testified (Rec., p. 88), that she had twice accompanied Miss Throckmorton to Judge Holt's residence in 1891, and on these occasions saw this colored servant girl who admitted them.

In surrebuttal the caveators were permitted to recall Martha Scott (Rec., pp. 118–119) again to deny that Anna Tulley had been there with Miss Throckmorton, the ground of admitting her evidence being, that Anna Tulley was not in court when Martha Scott first testified, although in her previous testimony she had not simply denied that Miss Throckmorton had called in company with Anna Tulley, but that she had ever called accompanied by "*any other person whomsoever.*"

While ordinarily the order in which evidence shall be introduced upon a trial is within the discretion of the trial court, yet, where that discretion is so exercised as altogether to

cut off one of the parties to the litigation from introducing evidence, competent and proper in itself, such a ruling becomes reversible error. So, here the caveatees could not, without omniscience have anticipated every possible question that could be raised as to the handwriting of each of the persons whose names appeared upon the paper in controversy. In their case in chief they produced witnesses to testify to the genuineness of the handwriting of the paper and the signatures thereto. When the witness Randolph specifically pointed out a peculiarity in the signature as the reason for his opinion that General Sherman's signature was a forgery, it for the first time became possible, and therefore material, for them to show that the basis of his opinion was fallacious. This they offered to do and the court denied them the right —a ruling in line with, and analogous to, that heretofore discussed in connection with the testimony of opinions based upon the style and composition of the paper. In so ruling the court made it impossible for the caveators to introduce evidence entirely competent and very material to their case —how material can not be said, for the weight of the evidence was for the jury—and in excluding the evidence, it is confidently submitted, an error was committed, for which, were it the only one in the Record, this case ought to be reversed.

The Opinion of the Court of Appeals on Rebuttal Evidence.

In considering this question, as in considering the question of the presumption to be attached to the paper in controversy from its mutilated condition, the Court of Appeals refrained from making a definite decision, that court saying (Rec., p. 162):

> "Whilst inclined to the opinion that the discretion of the court might well have been liberally exercised in favor of the admission of this evidence, we do not think that its exclusion, considering, too, the indirect and slight contradiction between it and the

> evidence of Randolph, was an error for which the judgment should be reversed."

The witness Randolph had not confined himself to the expression of opinion, but had given his reasons, testifying that, in his experience the upper line in the quirl of the "T" in General Sherman's signature touched the lower line; that he never saw a case in which they did not touch and he had seen thousands (Rec., p. 86). In order to rebut this evidence the caveatees proposed to show by Mr. Sherman (Rec., p. 103) that—

> "in the particular here mentioned, the return line of the curve or quirl, it was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature."

This was the "slight contradiction" referred to by the Court of Appeals. That court in its opinion states that, had Randolph testified that the alleged peculiarity was invariable, or, had it been offered to prove by Mr. Sherman that the signatures examined by Randolph did not contain the alleged peculiarity, this would have been proper rebuttal testimony, but that, Randolph having stated that this peculiarity occurred in four out of five signatures examined by him his statement might have been quite true, and yet the same peculiarity might not have occurred in any of the signatures with which General Sherman's son was familiar.

It is not necessary, however, to be competent in rebuttal, that the evidence should tend directly to contradict some statement of fact by the witness. The fact affirmed by Randolph might be admitted, yet if it could be also shown that it was not a uniform peculiarity and that the feature of the signature found in the will which led the witness to condemn it, was one of frequent or habitual occurrence in genuine signatures, would it not have shown that Randolph's opinion rested upon a false basis?

The value of his opinion was the important feature of his testimony.

A good illustration of the principle is found in the testimony of Mr. Sherman with respect to his mother's signature. He testified to the genuineness of her signature to the will; but, on cross-examination, that she "*usually* wrote her name Ellen *Ewing* Sherman; but that it was her habit to sign all legal papers Ellen B. E. Sherman," as it appears on the will (Rec., p. 21).

If this fact had not been developed on his cross-examination, and a witness for the caveators had based an opinion against the genuineness of her signature on the fact that in all, or nearly all, the signatures he had examined she wrote her name Ellen Ewing Sherman, would it not have been clearly competent and important in rebuttal to show that as to legal papers she adopted a different mode of signature, and would not that tend utterly to destroy the value of an opinion based upon an ignorance of that fact?

A NEW TRIAL, IF GRANTED, SHOULD BE CONFINED TO THE ISSUE OF FORGERY.

It was pointed out, *supra*, p. 25, that, of the four issues in this case, the second and third, presenting the questions of fraud and undue influence in the procurement of the will, were abandoned by the caveators, no evidence whatever having been offered upon either of them, and that the court peremptorily instructed the jury to answer each of them in the negative. It has also been shown, *supra*, pp. 57-97, and, counsel confidently submit, been made matter of demonstration, that there was not one particle of competent evidence submitted to the jury upon the fourth issue, presenting the question of the revocation of the will propounded, although it was not abandoned and that the trial court committed error in refusing to instruct the jury to

answer this issue as well as the issues of fraud and undue influence in the negative.

It is submitted that, if this court shall reverse the judgment below and award a new trial, such new trial should by the judgment of this court, be confined to the single issue of forgery—the only issue in the case upon which any competent evidence was offered.

The issues of fraud and undue influence having been abandoned by the caveators, no evidence in support of either having been offered, the caveators have not now the right to reopen and retry those questions, which have no relation to the issues that were contested.

The verdict upon the second and third issues being correct and entirely independent of, and separable from, the verdict on the first and fourth issues, should not be disturbed.

If the view contended for by the plaintiffs in error as to the issue of revocation be sustained by this court, the verdict upon that issue would necessarily stand in the same situation as does the verdict upon the issues of fraud and undue influence. The fact that that issue was not answered by the jury simply "No," but had added to it, contrary to the practice in trials at law, the words "because he never executed it," does not render the verdict less conclusive of that issue. As heretofore pointed out these words were added by the jury to their finding on this issue by permission of the court at the suggestion of counsel for the caveators.

One of the apparent objects of this suggestion, as appears from the colloquy between court and counsel (Rec., p. 141) was that they might not be bound by the verdict in the event of a new trial. This was obviously inadmissible, as the verdict must be either conclusive or a nullity. A verdict can never be conditional; and it matters not upon what ground the jury render their verdict, if responsive to the issue, it is absolute and conclusive of the facts tried and of all facts which might have been tried under the issue presented. Having elected to try all these issues together, for

it was "upon the motion of the counsel for the caveators" (Rec., p. 12) that this was done, they were bound to submit to a final and conclusive verdict upon all of them.

There was no power in the court or jury to make the verdict on any of them conditional upon subsequent events. The addition, therefore, to the verdict of the words suggested by counsel can not have the effect of qualifying the verdict in any particular, and moreover, having obtained a verdict in their favor upon one issue, and against them on the other three, they elected to stand on the verdict as rendered and to take a judgment upon the one issue found in their favor, by which course they are now estopped to dispute the validity and finality of the verdict upon the other three issues.

The verdict in this case being the answer of the jury separately given to four separate and distinct issues, is not, as in ordinary actions at law, where a general verdict is rendered, an entire thing, but is severable, and in reality consists in four separate verdicts, and should be so treated.

Perhaps the most complete examination and discussion of this question to be found in the books is by the Supreme Court of New Hampshire, embracing an exhaustive review of all the decisions on the subject, in the case of Lisbon *vs.* Lyman, 49 N. H. 553–605 (1870).

The action was assumpsit for support of the pauper wife and children of Volney Clough, resulting in a verdict for plaintiff.

The question was whether Volney Clough had a settlement in Lyman by derivation from his father. The court found that all the questions in the case had been correctly submitted to the jury, except that the court erroneously instructed the jury that the burden of proving the assessment of taxes against Volney's father was upon the defendant, and for this the case is reversed (p. 582).

In disposing of the question Doe, J., for the court says (p. 582):

"Should the new trial be of that part of the case in the former trial of which there was error, *or of the whole case?*

"Several questions of fact have been tried and decided by the jury. In the trial of the question whether Isaac paid all taxes duly assessed, there was error; all the other questions were correctly tried. *Is the correct trial of all the other questions invalidated by the mistrial of a single question? Is the right decision of all the other questions nullified by the erroneous decision of one?* If the error had affected the trial and decision of two of the questions, to the prejudice of the defendant, it would be necessary to try those two again, in order to correct the error; if the error had affected four of them, it would be necessary to try four again; if it had affected all of them, it would be necessary to try them all again. But the error in the trial of the question whether Isaac paid all the taxes duly assessed, did not affect the trial of any of the other questions. And there is no practical difficulty in granting a new trial of the question that has been erroneously tried, without disturbing the verdict. If, on the new trial of that question, the verdict should be for the plaintiff, judgment could be rendered for the plaintiff, for the damages assessed in the first verdict; if the verdict should be for the defendant, judgment could be rendered for the defendant; in either case, the record of the judgment would recite all the proceedings that produced the result.

"The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only what is erroneous when the latter can be severed from the former, and destroys no more of the good than is necessary in the process of rectification."

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(P. 583): "If substantial error in a judgment can be corrected without destroying the judgment, why should not error in a verdict be corrected without destroying the verdict? If the wrong parts of a judgment can be made right, without losing the

good parts, why is a verdict incapable of a similar rectification?

"The general principle of preserving the good, and destroying the bad, applies to the correction of errors in trials and verdicts, as well as to errors in judgments."

. . . . . .

(P. 584): "It is not unusual to direct the jury to find their verdict separately for different parts of the damages, so that, the parts being severable on the face of the verdict, an error may be cured by a *remittitur*. . . . The inquiry is into the practical separability of the substance of the verdict."

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(P. 585): "If there are several issues, and a verdict on all for either party, and an error in the trial of one of them, a new trial is not granted if the party having the verdict consents that a verdict be entered for the other party on the issue in the trial of which there was error. . . . The same rule applies to other proceedings. When an award is good in part, and bad in part, the valid part is sustained when it can be separated from the rest, and the justice of the case requires it, and the object of the submission can be accomplished."

Robbins *vs.* Townsend, 20 Pick. 345 (1838), was assumpsit brought by the plaintiff as master of the house of correction to recover for the support of a pauper. Verdict was rendered for plaintiff, and defendant moved for a new trial on the ground of misdirections of the judge in matters of law (p. 347).

Dewey, J., says (p. 351):

"But there having been a full and legal trial on the merits as to the other parts of the case, and the question of the appointment of the plaintiff as master of the house of correction being entirely disconnected with the other questions raised, and one which in no way could have had any influence upon the finding of the jury upon those questions, the new trial is

limited to this particular point. In cases like the present, substantial justice may be done without disturbing the verdict generally, by submitting to a new jury the question, in reference to which, evidence was erroneously admitted. Such a course has been sanctioned by this court, in the cases of Winn *vs.* Columbian Ins. Co., 12 Pick. 287; Sprague *vs.* Bailey, decided at October term, 1837, in Middlesex, and in several other cases within the recollection of the court. New trial ordered."

Amherst Bank *vs.* Root, 2 Met. 522 (1841), was an action of debt on a cashier's bond. Verdict was rendered for plaintiff, and defendants moved for a new trial on sundry exceptions. Only one exception was sustained, and, in remanding the case for a new trial, Shaw, C. J., for the court, says (p. 542):

"As the only exception, which is sustained, relates to the proof of the execution of the bond, the court are of opinion that this is one of those cases where the new trial should be confined to the point, whether the bond was duly executed, and that the issue to the jury on the new trial should be on that fact only. Winn *vs.* Columbian Ins. Co., 12 Pick. 279; Sprague *vs.* Bailey, 19 Pick. 442; Dyer *vs.* Rich, 1 Met. 192. If that fact is found for the plaintiffs, they will be entitled to a general verdict; otherwise a general verdict will be returned for the defendants."

In a more recent case in Massachusetts, presenting the exact phase of the question now before this court, growing out of findings by the jury upon several distinct issues to which separate answers were given, the same rule is applied.

The case is that of Codman *vs.* Dexter, 148 Mass. 421 (1889), and was a contest over a will and codicils. A number of issues were tried by the jury, among them the following:

2. Was Codman of sound mind at the time of making the will?

3. Was the will procured by fraud or undue influence?

6. Was he of sound mind at the time of making the first codicil?

7. Was the first codicil procured by undue influence?

9. Was he of sound mind at time of making second codicil?

The jury answered the second, sixth and ninth in the negative; the third and seventh in the affirmative.

The trial court, on motion for a new trial, set aside the verdict on the second and sixth issues and sustained the verdict on the third, seventh and ninth issues.

In disposing of the case on appeal, Knowlton, J., for the court, says (p. 423):

> "The only other question which has been argued before us is whether there was error in the refusal of the judge to set aside the findings of the jury on the third, seventh, and ninth issues. The third and seventh findings are that the will and first codicil, to which they respectively relate, were procured by undue influence and fraud, and the second and sixth findings are that the testator was not of sound mind at the time of making the will, and of making said codicil. The second and sixth findings were set aside, and the argument is, that the error of the jury in finding that the testator was of unsound mind at the time of executing each of these instruments must have entered into their findings, that he acted at the same time under undue influence, and that these findings should also have been set aside."
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> (P. 424): "It is a mistaken assumption that the issues as to sanity and undue influence, in a case of this kind, are necessarily so connected that error in a finding upon one of them implies error in the finding upon the other. In many cases, perhaps in most, they are very closely connected. In some the connection is slight and unimportant. Where there is a close connection, sometimes it is such that an error in relation to the former would almost certainly involve an error in regard to the latter, while

an error in regard to the latter would not be likely to affect the finding upon the former.

. . . . . .

"How far the fact that a jury has gone astray in dealing with one issue shall be deemed important in considering a motion to set aside their finding upon another, must depend upon the relations of these issues to each other in the particular case, the evidence introduced upon each, and any facts and circumstances which throw light upon the nature or probable cause of the jury's mistake. And, finally, each issue is to be dealt with by itself, in view of the evidence, and of all that has occurred in the course of the proceedings.

"In the case at bar, we see nothing to indicate that the discretion of the court was improperly or unwisely exercised."

That there was no error in the instruction of the court upon the second and third issues is plain, for no evidence having been offered upon them, the jury could not possibly have found those issues in the affirmative. That upon the evidence offered and admitted on the issue of revocation, the same course should have been pursued with regard to that issue, seems equally clear. But whether so or not, the verdict thereon was also against the caveators, so that these three issues stand upon the same plane, and, the verdict being against the caveators on all three, and the issues being entirely disconnected, this court, in the event of granting a new trial, should by its judgment confine the new trial solely to the issue of forgery.

CONCLUSION.

It is finally respectfully submitted:

First. That the judgment in this case should be reversed and a new trial granted because of the errors in the admission

and exclusion of evidence and the instructions to the jury;

Second. That such new trial should be confined to the first issue, because there was no competent evidence offered in support of the second, third, and fourth issues, or any of them, and the verdict thereon is against the defendants in error; and

Third. That the addition to the verdict on the fourth issue of the words "because he never executed it," was unauthorized, is mere surplusage, and should be disregarded, and this court should so adjudge.

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Reply Brf. of Darlington, C

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In the Supreme Court of the United States

OCTOBER TERM, 1899.

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No. ~~102~~ 21.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

Reply Brief for Plaintiffs in Error.

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LAW REPORTER PRINT.

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JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

Reply Brief for Plaintiffs in Error.

It is not the purpose of this brief to reargue the case of the plaintiffs in error, nor to respond to the arguments of the counsel for the defendants in error, but certain strictures in their brief upon the brief for plaintiffs in error seem to justify, if not require, notice. Nor is it intended to notice all of these criticisms, but only some of the more important, which seem to counsel for the plaintiffs in error not only to be unjustified reflections upon their fairness, but possibly misleading to the court.

It is stated, without qualification, that neither of the principal questions discussed in the brief for plaintiffs in error arises in the case; that neither of the important questions which are really raised by the Record are discussed or even stated in the brief for plaintiffs in error, which is mainly devoted to questions not presented by the Record at all (Defendants' Brief, pp. 4 and 5).

This criticism is not only severe, but, if justified, most humiliating, in that it necessarily attributes to counsel either

lack of capacity to understand the case or a deliberate purpose to mislead the court.

It is best answered by reference to the opinion of the Court of Appeals in this case which placed a different estimate upon the discernment and fairness of counsel for the appellants there, for it says (Rec., p. 155):

> "*The contention of the appellants is supported by the citation of many cases denying the competency of such evidence,* especially the subsequent declarations of the testator, on that issue" [execution].

If counsel for plaintiffs in error misapprehended the questions in the case, so did the court below, whose judgment counsel for defendants in error are seeking to uphold.

It is also stated that at the trial and in the Court of Appeals no objection was made to the evidence introduced relating to the period prior to February 7, 1873, and some of the assignments of errors in the Court of Appeals are reprinted with the comment that it is now suggested in this court that there was error in the admission of such evidence (Defendants' Brief, pp. 7–9).

The inference from this is that the plaintiffs in error have assumed a new position in this court. A comparison of the assignments of errors in the Court of Appeals, as quoted, with those in this court (Nos. 6, 7 and 8) will show that they are *identical in substance* and nearly so in language, the only verbal changes being in the interest of brevity and (as is hoped) improved grammatical construction.

It is not claimed in this court that there was error in the admission of evidence as to matters prior to February 7, 1873. No such claim could be made, because that evidence was not objected to at the trial and is not covered by any exception.

In the judgment of counsel, however, such evidence is incompetent and its admission, if objected to, would have been error.

It is also charged that—

> "From the beginning to the end of the brief submitted in this court on behalf of the caveatees, it *seems* to be assumed that the trial court had ruled that declarations made by Judge Holt as to past facts were competent evidence to prove those facts," (Defendants' Brief, pp. 9–10).

And that—

> "They now shift their ground and claim *apparently* that the declarations were admitted not for the purpose of either showing directly his testamentary intentions or showing them indirectly by manifesting his feelings toward the persons concerned, but for the purpose of showing that his statements as to past transactions were true" (Defendants' Brief, pp. 27–28).

These statements are wholly unfounded. No such position is "assumed" nor have counsel anywhere attempted to "shift their ground." At the very outset of their discussion of the issue of forgery counsel for the plaintiffs in error state (Brief, p. 108; see also, pp. 110, 124 and 199) that the caveators introduced evidence of the acts and declarations of the testator tending to show, as they claimed, *his state of mind, feelings and intentions with respect to various persons.* During the whole discussion of forgery this is the class of evidence referred to, and it is clearly shown, and now repeated, that the contention of counsel is that evidence of the state of mind, feelings or intentions of the testator or his relations to his next of kin or the legatees is utterly irrelevant to the issue of execution *vel non.*

Counsel for defendants in error also conceive it to be their duty—

> "to correct some of the errors contained in that part of the brief for plaintiffs in error which is headed 'statement'" (Defendants' Brief, p. 17).

Six pages are devoted to these supposed delinquencies of their adversaries. It is unnecessary to notice all of them; examination of a few will suffice to show who has fairly stated the evidence, and the value of the "correctors'" corrections.

Exception is taken to the statement in the brief for plaintiffs in error (Brief, p. 5) that Judge Holt spent the last thirty-four years of his life alone, unattended by any relative, his household consisting merely of domestic servants. This is one of the "errors" which counsel for the defendants in error "wish to correct," and undertake so to do by the following observations (Defendants' Brief, p. 17):

> "The *fact* is that the testimony tended to show that *several* of his relatives, especially the members of Washington Holt's family, visited him frequently, *sometimes* staying six months *at a time*" (citing Rec., p. 69).

The plain inference from this "correction" is that more than one relative was an inmate of Judge Holt's house for six months on more than one occasion.

Certainly the phrase "several of his relatives" in this connection means more than one of them, and the phrase "*sometimes* staying six months *at a time*" means more than one visit of that duration. Yet "the fact is" the evidence referred to shows (Rec., p. 69) that only *one* person, not a relative, but the wife of a relative, was ill at his house on *one* occasion for five or six months.

The same evidence (Rec., p. 69) shows that a relative (Mary Holt) spent several months in Washington in 1893, but *at a boarding house.*

Furthermore, the Record will be searched in vain for a trace of evidence that any one of his relatives ever spent so much as *one* month at his house.

It is submitted that this "correction" serves only as confirmation of the statement sought to be corrected.

The next "correction" is of the statement in brief for plaintiffs in error (Brief, p. 5) that Joseph Holt espoused the Union Cause with zeal and bitterness, while his relatives allied themselves with the Confederacy.

The "correction" is made by saying (Defendants' Brief, p. 18):

> "The bill of exceptions states that the evidence tended to prove that during the war Joseph Holt *had not manifested any bitterness of feeling toward any of his relatives*" (citing Rec., p. 49),

and this statement is repeated in similar language (Defendants' Brief, pp. 24–25).

Opposed to this is the evidence on behalf of the defendants in error by two of themselves. Robert S. Holt says (Rec., p. 60):

> "Joseph Holt had become very much embittered toward the South and Southern people, growing out of the war, which *bitterness existed between him and some members of his family*," and—

(Rec., p. 61) that he felt—

> "somewhat resentful that the latter [Joseph Holt] had permitted the *bitterness growing out of the war* to so affect his relations to his family that he had apparently manifested no interest in the family of his brother."

And again (Rec., p. 64) that—

> "Witness did not know how Joseph Holt felt towards him and devoted little thought to the subject, only feeling that if indifference to the children of his brother could spring from *the bitterness and hostility engendered by the war* witness had no concessions or compromises to make."

Mrs. Bowmer, another of the defendants in error, says (Rec., p. 64):

> "Joseph Holt *never visited her father's house after the first year of the war*; that he did not revisit Kentucky

> until 1869 or 1870, when he stopped at the old homestead, with the family of Thomas Holt [the father of Washington Holt]; that at that visit *there were cold and strained relations between him and said family.*"

This "correction," like the former is a confirmation of the statement in the brief for plaintiffs in error. Surely, counsel for plaintiffs in error are justified in stating the facts as established by the uncontradicted evidence of the caveators themselves, given in their own behalf, and it is submitted that the counsel for defendants in error have no right to characterize such statement as an "error" or to attempt to "correct" it by ignoring their own evidence.

Exception is also taken to the fact that in the brief for plaintiffs in error (Brief., p. 10) it is stated that Devlin

> "frequently met Judge Holt socially at the house of Mrs. Throckmorton, Sr., [and] occasionally called on him."

Counsel for defendants in error assert that this statement is misleading to this court, the objection being that Devlin's testimony is the only evidence in support thereof, and that

> "all the other testimony on the subject showed that it was untrue" (citing Rec., pp. 43, 81), (Defendants' Brief, p. 18).

Examination of the Record pages referred to will show that the characterization of Devlin's testimony as untrue is wholly unjustified and unfounded. At page 43 Colonel Winthrop merely says that *at the office* he saw "no indication" of social relations between Devlin and Judge Holt, while at page 81 it is stated that the caveators gave evidence "*tending to prove*" that there never were at any time social relations between Devlin and Judge Holt. It is to be observed that nothing found in either of these references to the Record denies that Judge Holt visited Mrs. Throckmorton, Sr., or that Devlin frequently met him at

her home, nor that Devlin "occasionally called on him."

But even if the testimony for defendants in error had contradicted Devlin, it is submitted that it would not follow that his testimony was untrue.

Counsel for defendants in error take quite a different view of contradictions of their own witnesses. They assert as a fact (Defendants' Brief, p. 17) that—

> "during the last fourteen years of his [Judge Holt's] life neither Devlin nor any member of the Throckmorton family ever entered his door, except that on one or two occasions Miss Throckmorton obtruded herself upon him for a few moments" (citing Rec., pp. 82–84).

Pages 82 and 83 contain no reference to the visits of either Devlin or Miss Throckmorton.

The only reference in these three pages of the Record to Devlin is by Judge Holt's coachman who says (Rec., p. 84):

> "He *does not remember* taking Mr. Devlin's name to the testator nor hearing the testator speak of him; that he does not remember all the strangers who called."

The only reference to the visits of Miss Throckmorton is in the testimony of the colored servant, Martha Scott, also on page 84. That witness does not say, however, that Miss Throckmorton, "on one or two occasions" "obtruded herself upon him for a few moments." This is merely the license in deductions from the evidence which exact counsel permit themselves while "correcting" the "errors" of their adversaries.

What she says is (Rec., p. 84), that in 1886 Miss Throckmorton called and remained with Judge Holt in the parlor "*about three-quarters of an hour*" ("few moments" of adverse counsel). About a year later she called when Mrs. Washington Holt was there, and Judge Holt "on that occasion saw her in his dining-room."

This witness also says (Rec., p. 84) that Miss Throckmorton called again when Judge Holt was sick in bed, and he sent word by witness he could not see her; that Miss Throckmorton then asked the cook, Ellen Foster, to go up and say she only wished to see him for five minutes; that he then said he would see her for that length of time, and she did not remain very long. That she called again when he was not at home.

Martha Scott denied that Miss Throckmorton called on any occasion accompanied by the white servant, Anna Tulley, or by any other person whomsoever. She is squarely contradicted by the white girl, Anna Tulley (Rec., p. 88), and by Miss Throckmorton (Rec., pp. 115, 116), yet, notwithstanding the rebuke given to counsel for plaintiffs in error (Defendants' Brief, p. 18) with reference to the supposed contradiction of Devlin, counsel for defendants in error are not restrained by these contradictions of their witness, Martha Scott.

Counsel for defendants in error take exception to the statement in the brief for plaintiffs in error (Brief, p. 17) that from the time Judge Holt died, to the present, the caveators "have been in absolute control of all his papers and effects," and say (Defendants' Brief, p. 20):

> "This *reckless statement* is made without reference to any part of the Record, which is supposed to support it."

On pages 15 and 16 of the brief for plaintiffs in error it is shown, and the pages of the Record are given, that from the day of Judge Holt's death (August 1, 1894), to September 28, 1894 (a period of fifty-eight days), the caveators, Washington Holt and Sterret, were in actual possession of Judge Holt's effects, and that, during that time they burned such of his papers as they saw fit to destroy. The administrator was appointed on September 28, 1894, upon petition of the caveators herein, when none of the plaintiffs in error

were before the court and their claims of interest in the estate were unknown. The administrator thus appointed represented the next of kin and creditors, and claimed office in direct hostility to the plaintiffs in error.

It is upon this basis that counsel for the plaintiffs in error said, what (after the benefit of the correction of adverse counsel) they now deliberately repeat as established by the Record, that the defendants in error, from Judge Holt's death, have been in absolute control of his papers and effects.

The suggestion of counsel for defendants in error (Defendants' Brief, pp. 20 and 21), that under a verbal agreement between counsel for the parties, counsel for plaintiffs in error were permitted to examine the papers of Judge Holt, though certainly not in the Record, is not controverted; but it is submitted that the fact that the consent of counsel for the defendants in error was necessary and effective to give to counsel for plaintiffs in error access to the papers, demonstrates the correctness of the statement criticised, since counsel for defendants in error could give no such authority to examine the papers unless their principals, the defendants in error, were in control.

It is submitted therefore that the statement in the brief for plaintiffs in error is not a "reckless statement," but is a fair one, the truth of which is demonstrated not only by the Record but by the matter outside the Record imported into this discussion by adverse counsel in their criticism.

As stated at the outset it is not the purpose of this brief to notice all the "errors" complained of by counsel for defendants in error. It is submitted that as to the "corrections" noticed, the correctors are themselves at fault, and counsel, therefore, leave to the court the comparison of the statement of facts in their brief with the Record in the fullest confidence that no lack of fairness or accuracy will be discovered.

Counsel for defendants in error (Defendants' Brief, p. 21) criticize the statement at pages 178 and 179 of brief for plaintiffs in error that none of the letters of Judge Holt in the record contain any suggestion of a purpose to make a will in Washington Holt's favor. They quote a sentence from a letter to Mrs. Vanda Holt which they claim is marvellously like an instruction by Judge Holt to his executor. It has never been contended that Judge Holt intended to make Mrs. Vanda Holt his executrix; and, therefore, if the inference drawn from this letter be justified, it applies as much to Devlin, the executor appointed by the will in controversy, as to any other person who might have been so appointed. The letter quoted might be conceded to be a valid bequest of the piano mentioned, but in no view does it furnish evidence of a purpose to make a will in Washington Holt's favor, which is the statement criticized.

At page 22 of their brief counsel for defendants in error take exception to a statement by counsel for plaintiffs in error (Brief, p. 88) when, in speaking of the case of Hitchings *vs.* Wood, it is said that in the trial of that case, "as in the trial of the case at bar, it unexpectedly developed" that the persons most interested in the suppression of the document in contest had burnt the decedent's papers, and complain that this statement is not accompanied by any reference to the Record. At pages 17 and 82 of the brief for plaintiffs in error, in discussing the evidence on this point, it is clearly shown that this evidence was first brought out after the caveatees had closed their case, and Record pages showing this are given in each instance. Nowhere in the Record is there a suggestion that the fact appeared in evidence or was known before that time.

The straits to which counsel for defendants in error are driven in their zeal to "correct" the "errors" of adverse counsel, is well shown by their going outside of the Record

and appealing to the newspapers to support this particular criticism, for which they can find no support in the Record (Defendants' Brief, p. 22). It is submitted that counsel are not at liberty to refer to publications in the newspapers, especially as to anything not evidence in the cause, and the matter is not proper to be presented to this court. Counsel for plaintiffs in error have no knowledge as to what, if anything, was published in the daily press concerning the burning of Judge Holt's papers, but it is submitted that nothing which was so published can in anywise affect the legal consequences resulting from the unlawful burning by the defendants in error, or supply any fact not furnished by the Record.

Counsel for defendants in error (Defendants' Brief, pp. 21 and 22; see, also, pp. 37, 39) assert that one of the counsel who signs the brief in behalf of plaintiffs in error, and who participated in the trial of this cause before the jury, took no part in the preparation of that brief. This is an unauthorized assumption and one that can in no wise affect the merits of this controversy, which must be disposed of upon the record here presented without the aid of the atmosphere of the trial court. But counsel deem it proper to say that each and every of them co-operated in the production of that brief and reaffirm all it contains, notwithstanding the criticisms of adverse counsel.

Counsel for defendants in error complain (Defendants' Brief, p. 23) of the form of the assignments of errors and that they have been compelled "to grope through the numerous pages of the record," etc. The court will see that in each assignment of error the exceptions to which it relates are designated by their numbers and the pages of the record are given. To have set out the evidence and rulings at large in each of the errors assigned would have involved a reprint of the bill of exceptions—or 122 pages of the

Record. Counsel understand the plan adopted by them in this case to have met the express approval of this court.

Buckstaff *vs.* Russell, 151 U. S. 626, 636–7.
Hickory *vs.* United States, 160 U. S. 408, 413–14.

In this connection it is proper to say that the brief for plaintiffs in error was delivered to counsel for defendants in error January 22, 1900, while counsel for plaintiffs in error did not receive the brief for defendants in error until April 17, 1900, the day before the case was placed on the call for argument. During those eighty-five days no suggestion was heard from counsel that the assignments of errors were in any respect insufficient or uncertain, although there was ample time for their amendment, had such been deemed necessary or desirable.

Nevertheless, counsel remained quiescent, and proceeded with the preparation of their brief based upon those assignments of errors. It is submitted that this objection is not only ill founded, but under the circumstances not entitled to favorable consideration.

As it is not the purpose of this brief to make a reply argument, the questions of law raised and discussed in the brief for defendants in error will not be considered. It is thought proper, however, to call the attention of the court to the fact that the corrections attempted in this part of the brief for defendants in error are not more reliable than the attempted corrections of matters of fact.

Counsel for defendants in error assert that in this court plaintiffs in error have "shifted their ground" and "shrink from arguing" that any evidence to show the testator's intention after the date of the will was inadmissible, but that the burden of their complaint is that the matters to which this evidence relates occurred at an unreasonably long period after that time (Defendants' Brief, p. 26).

This is incorrect. The position of plaintiffs in error is

that Judge Holt's supposed intentions at any time are utterly immaterial, and that the admission of any evidence tending to show such intentions after the date of the will was error. Evidence of Judge Holt's conduct toward Mrs. Inglehart, in 1874, was as inadmissible as his alleged declarations to Barclay, in 1893, the remoteness in point of time only serving to emphasize the irrelevancy of the evidence and make the error more obvious (Plaintiffs' Brief, p. 176).

Counsel for defendants in error (Defendants' Brief, p. 33) say:

> "There has not been found a single case in any court in which it has been decided that on the trial of an issue of forgery in a will case it is not competent to prove the testamentary intentions of the decedent after the date of the alleged will."

This assertion is repeated in similar language at pages 41 and 42.

In three of the cases involving the issue of forgery cited by plaintiffs in error in their brief, the courts held declarations tending to show the testator's intention to be inadmissible on that issue.

In Boylan *vs.* Meeker, 4 Dutch. (N. J.), Van Dyke, J., says (p. 303):

> "The first exception taken at the trial was to the verbal declarations of the deceased . . . made at various times through a course of years . . . to prove that it had long been his *intention to make a different will, in some respects, from the one in question*, and consequently that he could never have executed this one." (See Plaintiffs' Brief, p. 128.)

The court held this evidence inadmissible.

In Johnson *vs.* Hicks, 1 Lans., the court says (p. 158):

> "Upon the trial the appellants offered to prove the declarations of Mason Hicks, before the time of

making the alleged will, that he *intended* to give his property to the legatees therein named." (See Plaintiffs' Brief, p. 137.)

The court held this evidence inadmissible.

In Swope *vs.* Donnelly, 190 Pa. St., the court says (p. 422):

"The testimony of one of the witnesses tended to show that there was a prior will; that of the other an *intention* to make a will, and perhaps that of both a *general intent* that her husband should receive only such share of her estate as the law would give him." (See Plaintiffs' Brief, p. 147.)

This testimony was held inadmissible.

At page 37 of their brief counsel for defendants in error quote Miss Throckmorton's testimony (Rec., p. 116), to the effect that Judge Holt told her that he had provided for her, and that she would be perfectly independent; and state that they understand her counsel admit this was competent, as tending to show Judge Holt's knowledge, in 1892, of the existence and contents of the will in dispute.

This is an entire misapprehension. Counsel for plaintiffs in error do not admit that this evidence was competent for any purpose. It did not tend to show a knowledge by Judge Holt of the contents or existence of the paper propounded, but simply an intention, existing in 1892, to provide for Miss Throckmorton, and was clearly inadmissible.

This declaration was not offered in chief to support the will, and the only justification for its admission was in rebuttal of similar evidence for the caveators which, under the previous ruling of the court, had been admitted against caveatee's objection.

In the brief for plaintiffs in error, in speaking of the case of Kennedy *vs.* Upshaw, 64 Texas, it is stated (Brief, p. 164) that counsel on each side in that case cite the previous decision of Johnson *vs.* Brown, 51 Texas, as authority

for both the admission and the exclusion of the testimony, and that the *court cites it* as authority for the *exclusion* of the evidence.

In the brief for defendants in error it is stated (Defendants' Brief, p. 63):

> "Johnson *vs.* Brown was cited by counsel on each side of the case, but *is not referred to in the opinion of the court.*
>
> . . . . . .
>
> "It is clear that the reason Johnson *vs.* Brown *is not referred to* in Kennedy *vs.* Upshaw, is that the two cases involve such different questions that the earlier one had no bearing upon the later decision."

A reference to page 419 of the report of Kennedy *vs.* Upshaw, 64 Texas, will show that the case of Johnson *vs.* Brown, 51 Texas, is referred to in the opinion of the court; that it is there cited precisely as stated in the brief for plaintiffs in error, and that this "correction" by counsel for defendants in error is not a correction, but a direct contradiction of the fact.

In their discussion of the question whether or no the error in admitting opinion evidence based on the style and composition of the will was cured by the subsequent instruction to disregard, counsel for the defendants in error (Defendants' Brief, pp. 76–83), refer to several authorities which have been already distinguished by the counsel for plaintiffs in error (Brief, pp. 211–212), and undertake by the citation of two New York cases to show that the rule established in that State as enunciated in Erben *vs.* Lorillard and Furst *vs.* Railroad Co. no longer prevails. The first of the cases cited by them (Detroit *vs.* Burr, 56 N. Y.) was decided four years prior to Furst *vs.* Railroad Co., and is not completely reported. The report, however, does show (p. 667) that the question to which the evidence admitted and withdrawn related was found in favor of the party complaining of its admission, who could therefore not have been injured thereby

The other case (Gall *vs.* Gall, 114 N. Y.) is analogous to Hopt *vs.* Utah in this court. A sentence of the court's opinion, *not quoted*, but immediately preceding the part quoted by counsel for the defendants in error, reads:

> "The evidence was stricken out *immediately after it was received and before it had had time to produce any permanent impression upon the minds of the jury.*"

This sentence, it is submitted, presents a very material fact, necessary to be considered in order to a correct understanding of the opinion, and should not be separated from the passage quoted by counsel for defendants in error.

Further discussing this question the brief for defendants in error states (Defendants' Brief, p. 80):

> "*All the cases cited* by adverse counsel on this point *are New York cases* prior to the case last referred to" [Gall *vs.* Gall, 114 N. Y.].

The cases of Washington Gas Light Company *vs.* Lansden, 172 U. S. 534 and Waldron *vs.* Waldron, 156 U. S. 361, cited by adverse counsel (Plaintiffs' Brief, pp. 212, 213) are certainly not New York cases.

While claiming that the subsequent exclusion of this evidence from the jury cured any error in its admission, counsel for defendants in error still insist upon its admissibility, but cite no authority in support of that contention, saying (Defendants' Brief, p. 83):

> "Authorities on the direct point can hardly be looked for."

This observation is justified so far as authority in support of the admission of the evidence is concerned, but can not be made with reference to authority for its exclusion as the case of Lee *vs.* Bennett, cited by counsel for plaintiffs in error (Brief, pp. 203–4) is precisely in point and holds the evidence to be inadmissible.

Counsel for defendants in error (Defendants' Brief, p. 95) cite the case of Bennett *vs.* Sherrod, 3 Iredell L. 303, as supporting their position that the court, in the absence of evidence on the subject, must presume the mutilation of a will to have been done by the testator, because fraud is not to be presumed, and they quote a passage from the opinion in that case.

Immediately following the passage quoted occurs this language:

> "All the rules above stated, we think, may be taken for good law; but it seems to us that they are not apposite to the case now before us. *There is no evidence in the cause that the will was found mutilated in the lifetime of the testator, or found mutilated among his papers immediately on his death.* It was on the day after his death that application was made to his widow for the will. She, who is the party defendant in this issue, acknowledged that the will or paper was there, but refused then to deliver it. She then locked the drawer where the paper was and put the key in her bosom. There is no evidence that the will was, at that time, mutilated; for her declarations then made do not prove that fact, but rather import the contrary. *On the second day after the testator's death, and after the widow had every opportunity of mutilating the paper, with which she was dissatisfied,* the will was found by the plaintiff in the drawer in its present state. *It seems to us, so far from its being the duty of the judge to charge the jury that the law presumed this mutilation to have been the act of the testator, that it would be erroneous if he had so charged.* We are of opinion that the judgment must be affirmed."

The decision of the court is thus seen to be directly adverse to the contention of counsel citing it, and strongly supports the position taken by plaintiffs in error (Brief, pp. 79–91).

Counsel for defendants in error cite (Defendants' Brief, pp.

98, 99) as authority for the guidance of this court passages from an opinion in what they style "an unreported case," that of the will of Solomon Sublette.

This "opinion" emanates from Mr. Theo. Rassieur, the judge of the Probate Court of St. Louis.

By reference to the Revised Statutes of Missouri (1889) it will be seen that the judge of the Probate Court is not required to be a lawyer, his only qualifications being that he "shall have attained the age of twenty-four years," shall have been a citizen for five years and a resident of the county for one year.

The provisions of the law are as follows:

Vol. I, Ch. 46, Art. 1, Sec. 3223 (p. 811):

> "Qualifications of Judges.—Every judge of the Supreme Court and of the St. Louis and Kansas City courts of appeals . . . shall be learned in the law. Every Judge of the Circuit Court . . . shall be learned in the law. *Every judge of probate* and of a county court *shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election.*"

Ch. 46, Art. 4, Sec. 3403 (p. 837):

> "The judge of probate, *if otherwise qualified*, may practice as an attorney and counsellor at law in any of the courts of this State, except his own."

It is clear, therefore, that his opinion is wholly without weight as an authority.

In thus criticising this citation, no reflection is made upon Mr. Rassieur, who may be a lawyer of the highest ability. Nothing is known to counsel on that subject, however, and there is no reason for assuming that he possesses qualifications in excess of the requirements of law.

The facts of the case and the nature of the proceedings

not being accessible to counsel, no judgment can be formed as to the soundness of the opinion. It is submitted, however, that it is not a judicial deliverance which this court should recognize as authority or even as a precedent.

In the judgment of counsel for plaintiffs in error there are many other points of just criticism in the brief for defendants in error, which have not been noticed. It has been deemed unnecessary to do more than point out certain clear mistakes of fact and law which, it is submitted, disclose the necessity for close scrutiny of the statements of fact and propositions of law advanced on behalf of defendants in error.

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POSTSCRIPTUM.

By accident the case of Insurance Company *vs.* Hillmon, 145 U. S. 285, was omitted from the main brief filed in behalf of the plaintiffs in error. It was intended to be cited in the discussion of the subject of revocation, because, in that case, this court announces (p. 295), the proposition for which we contend, viz:

> "*When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention.*"

As no act by Judge Holt revocatory in character was

shown or attempted to be shown in evidence it follows, under the explicit ruling of this court, that no declarations of intention were admissible in proof of revocation.

The case is cited by counsel for defendants in error in their brief (Defts. Brief, pp. 39-40), but the application to this case of anything in the decision except the general proposition above cited is not perceived.

The court is at pains to show in the Hillmon case that the intention with which Walters left Wichita was in itself a distinct and material fact in a chain of circumstances which the evidence tended to prove. A distinct fact is not an independent fact any more than a distinct link in a chain is an independent link, and the court itself shows that the intention of Walters was connected with an act—another distinct fact in the chain, viz: the act of leaving Wichita.

In the case at bar it is contended by plaintiffs in error that evidence of testamentary intention unconnected with the testamentary paper, the execution of which is in issue, is inadmissible on the question of execution by reason of the restriction so plainly stated in the Hillmon case by this court. And, furthermore, that in this case it is not shown by the record, nor is it attempted to be shown in argument, that any testamentary intention of testator which the evidence of the defendants in error tends to prove, is a distinct and material fact in any chain of circumstances, or is connected with any fact material and relevant in any such chain of circumstances.

What this court says in the Hillmon case (p. 297), with reference to will cases, shows that it was not the intention of the opinion to qualify or modify the general proposition enunciated as to the absolute necessity of showing the connection of any declaration sought to be proved as qualifying an act with the particular act in question, whether such act was part of a chain of circumstances or not.

In the case at bar there is no evidence of any act by the

testator which his intentions could qualify; and there is no chain of circumstances of which his intentions could be a part; while the question whether his intention could be of itself not only a distinct and material, but an INDEPENDENT, fact to be proved on an issue of execution *vel non* is the great question in the case.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 103.

JOSEPHINE H. THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET BOWMER, AND OTHERS.

BRIEF FOR DEFENDANTS IN ERROR.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-16-1900

IN THE

Supreme Court of the United States.

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No. 103.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

On the first day of August, 1894, Joseph Holt died in the city of Washington, leaving an estate of about $180,000, all of which was personal property except his dwelling-house on the corner of C street and New Jersey avenue southeast. His nearest surviving relatives were a number of nieces and nephews, who are the defendants in error here. No will having been found, three of his nephews, Washington D. Holt, William G. Sterett, and John W. Holt, filed a petition in the supreme court of the District of Columbia, holding a special term for orphans' court business, setting forth, among

other things, his intestacy, and asking the court to proceed to administer his estate (Record, 1–3).

On the 28th of September, 1894, the National Safe Deposit, Savings and Trust Company of the District was appointed administrator of the estate (4), and that corporation immediately entered upon the performance of its duties as administrator and has continued to perform them to this day.

On the 26th day of August, 1895, there came by mail to the register of wills in Washington a sealed envelope addressed to that officer which was postmarked "Washington, D. C., August 24, 6 p. m., 1895, L" (21, 119). Upon opening this envelope the register of wills found therein a paper purporting to be a will executed by "J. Holt," dated "Feb'y 7th, 1873," to which were appended what purported to be the signatures of Ellen B. E. Sherman, U. S. Grant, and W. T. Sherman. This will gave one-half of the estate to "Lizzie Hynes" and the other half to Josephine Holt Throckmorton. On the afternoon of August 24 Josephine Holt Throckmorton, who lived in New York, passed through the city of Washington, stopping about an hour at the Baltimore and Potomac depot, which is in what is known as the northwest section of the city (116). The envelope in question was mailed between 3 and 4 o'clock, or a little earlier or a little later, on that afternoon, in a letter-box in the northwest section (119).

The real name of the other devisee was Elizabeth Hynes (90, 93). She was a relative of Judge Holt's second wife, who died about 1860, and he had been supporting her for many years. She lived in Kentucky.

Josephine Holt Throckmorton is a daughter of Major Charles B. Throckmorton, of the United States Army. In 1873 and for a long time prior thereto the relations between Judge Holt and the Throckmorton family were intimate and affectionate. Josephine was born in September, 1866 (114, 115), and was consequently about six and a half years of age at the date of the alleged will.

The executor named in the alleged will was Luke Devlin. Judge Holt was judge advocate general of the army from 1862 until 1875. From 1862 until 1869 Devlin was a messenger in the office of the judge advocate general, and during the remainder of Judge Holt's term as judge advocate general he was a clerk in that office (81, 22).

On the 20th of September, 1895, Devlin filed a petition asking the court to admit the alleged will to probate and to revoke the letters of administration theretofore granted (4, 5). On the 18th of October, 1895, Washington D. Holt and the other nephews and nieces of Judge Holt who would be the distributees of his estate if he had died intestate filed a caveat to the alleged will (6, 7). Devlin, "Lizzie Hynes," and Miss Throckmorton filed an answer to this caveat (9). On the 20th of March, 1896, the probate court framed four issues to be transmitted to the special term of the same court, sitting as a circuit court, there to be tried by a jury. These issues were whether the instrument in question had been executed by Joseph Holt as his last will and testament, whether its execution had been procured by fraud, whether it had been procured by undue influence, and whether, if he had executed it, he had revoked it (12). The trial of these issues began on the 18th day of May, 1896. The evidence at the trial was confined entirely to the first and fourth issues—that is, as to whether Holt had executed the paper as his will, and, if so, whether he had revoked it. The trial terminated June 25, 1896, the jury finding that the paper had never been executed by Joseph Holt as his last will and testament, and that "because he never executed it" he had not revoked it (13).

This verdict having been returned by the circuit court to the probate court, final judgment was entered in the probate court on the 10th of July, 1896, formally adjudging that the paper was never executed by Holt as his last will and testament and denying it probate for that reason (14). At the foot of the judgment it was noted that Devlin, "Elizabeth

Hynes," and Miss Throckmorton appealed to the Court of Appeals (15). On the 3d of August, 1896, Elizabeth Hynes withdrew her appeal (16). The one-half of the personal estate which, under the alleged will, would have gone to Miss Hynes (less a sum retained to meet possible expenses) has been distributed among the caveators, and the controversy has since involved only that one-half of the estate which the instrument in controversy purported to give to Miss Throckmorton, and Luke Devlin's possible claim to commissions as executor (17).

The Court of Appeals affirmed the judgment of the probate court (162). The opinion of the court was delivered by Mr. Justice Shepard (146 to 162), and was concurred in by the other members of the court.

Thereupon Luke Devlin and Joseph Holt Throckmorton brought the case here by writ of error.

Counsel for plaintiffs in error on the first page of their brief state that the main questions of law raised in this case have never before been presented to this court, and that those questions are of such gravity and importance that they call for the most exhaustive research of precedents and the fullest presentation of argument. Counsel then proceed to state what they conceive these two grave and important questions to be. It becomes necessary for us to state somewhat in detail the proceedings at the trial as they appear in the record here for the purpose of showing that neither of the questions referred to has arisen in this case. It will appear further on, as we think, that neither of them has arisen or been discussed in any reported case. It will be seen also that the two important questions which are really raised by the record in this case are the following:

1. When after the death of a person a paper purporting to be his last will, but dated more than twenty years before his death, comes from an unknown source, bearing marks of burning and mutilation, which are sufficient to revoke it if done by the testator with that intent—the paper having no

attestation clause, but purporting to be signed by witnesses, all of whom have long been dead—and there is no evidence to connect the paper with the testator except opinions as to the handwriting, and no evidence whatever to explain the burning and mutilation, may such will be admitted to probate?

2. In the case above suggested, if those who offer the instrument for probate are entitled to have it considered at all without connecting it with the testator and without any explanation of the burning or mutilation, must the evidence at the trial of the issue as to the genuineness of the paper be confined to opinions as to handwriting and to circumstances antedating the will; or are the relations of the supposed testator to the persons benefited by the will, on the one hand, and to those excluded by it from sharing in his estate, on the other, from the time of its date to the time of his death also admissible as tending to show that it was or was not probable that he executed the instrument and continued it in force as his will during the remainder of his life?

Neither of these questions is discussed or even stated in the brief for the plaintiffs in error. That brief is mainly devoted to the discussion of questions which are not presented by this record at all.

The trial began by the introduction of evidence of three witnesses on behalf of the caveatees tending to prove the genuineness of the three signatures which appear at the foot of the paper in controversy (20, 21). This was followed up by evidence tending to prove that the remainder of the paper, including the signature "J. Holt," is in the handwriting of Joseph Holt (21, 22, 23). It was admitted by counsel on both sides that the paper in controversy came to the office of the register of wills anonymously on the 26th of August, 1895, in the same state in which it was presented

to the jury—that is, mutilated and partly burned, and the place torn off where the seal should have been (21).

When without further evidence the instrument was offered in evidence by counsel for the caveatees, the caveators objected "on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated, and had been sent to the register of wills anonymously, and that it was incumbent upon the caveatees to explain these circumstances before the will could be read to the jury." This objection was overruled by the court (21).

The only other evidence offered by the caveatees in support of the first issue, as to which, of course, the burden of proof was upon them, was the testimony of the three persons named in the will that they never saw the paper or heard of its existence until after it had been sent to the register of wills (22).

It should be noted that the caveatees had proposed to close their case-in-chief after calling only one witness as to the handwriting of Judge Holt; that the caveators objected that it was incumbent upon the caveatees to put in all their testimony as to the establishment of the alleged will before the caveators were called upon to offer any evidence on their part; that the court sustained this contention, and that the caveatees accepted the ruling as a matter within the discretion of the court and proceeded to offer the testimony of several other witnesses as to the handwriting of the paper (22, 23).

The caveatees having closed their evidence, the caveators gave evidence by a number of witnesses familiar with the handwriting of Judge Holt tending to prove that neither the will nor the signature thereto was in his handwriting (29, 31, 47). They also offered a mass of testimony as to the relations that existed prior to February 7, 1873—the date of the paper in controversy—between Judge Holt and the

three persons named in the will, on the one hand, and his relatives, on the other. *None of this evidence was objected to.* It was conceded by counsel on both sides during the trial that any evidence that would tend to put the jury in the position of Judge Holt on the 7th of February, 1873, so that the jury might be enabled to determine as to the probability that such a will as this would have been executed by him on that day, was relevant and important. As no hint of this fact appears anywhere in the brief of the plaintiffs in error and as throughout it conveys a contrary impression, it becomes necessary for us to show the court by the record that our statement is correct.

In the direct examination of Emily Edson Briggs by the caveators as a witness in their behalf she was asked to state what she had observed as to Judge Holt's treatment of the Throckmortons and what she had heard him say about them. Thereupon counsel for the caveatees said to the court:

"We object to that *unless the time is fixed either anterior to the date of the will or contemporaneously with it.* What he may have said or thought about them in years *after* the making of the will would throw no light upon the question of its genuineness" (31).

Thereupon counsel for the caveators stated to the court that they claimed it was competent to offer evidence as to the declarations of the testator with reference to his will and the distribution of his property as tending to show his relations both with the persons named in his will and those who under the law would have taken his property if he had died intestate, and that such declarations were competent, "whether they were made before, at the time of, or after the date of the will;" whereupon counsel for the caveatees said: "Only the last proposition is in dispute" (32); and when the evidence of Mrs. Briggs had been given objection was made upon the ground that it was incompetent

upon the question of the genuineness of the will because "long subsequent in date thereto" (36).

It was then stipulated by counsel, in the presence of the court, "that any further testimony that might be offered on behalf of the caveators as to any declarations made by said Joseph Holt *after* February 7, 1873, as to his testamentary intentions," should be deemed admitted subject to the objection and exception of the caveatees (39).

So by reference to pages 49 to 54 of the record it will be seen that there was no objection to the evidence of the caveators going over the whole life of Judge Holt prior to February 7, 1873, showing his relations with his next of kin, but that when in the course of the examination of one of the caveators, Lockie Holt Iglehart, her wedding trip to Washington, in 1874, was reached, and when she was asked how Judge Holt treated her and her husband on that occasion, counsel for the caveatees objected on the ground that testimony as to the relations between the testator and his relatives *subsequent to the date of the will in controversy* was inadmissible and incompetent (54).

And as to the numerous letters from Judge Holt to his relatives which were put in evidence by the caveators, only those subsequent to February 7, 1873, were objected to, as will be seen by reference to page 61 of the record, where it is stated that "the foregoing letter and all other letters *subsequent to February* 7, 1873, and all testimony as to the relations between Joseph Holt and his relatives *subsequent* to that date" were objected to on the ground that the relations between Holt and his relatives "subsequent to the date of the will in controversy" were inadmissible and incompetent (61); and on page 84, in the seventeenth exception, it is stated that the objection is to the admission of testimony "as to the relations with Mrs. Throckmorton *after* 1873."

In the brief which was filed on behalf of the caveatees in the Court of Appeals they made no complaint in their assignments of error as to the admission of evidence of the

relations between Joseph Holt and the different parties in interest prior to February 7, 1873. Their first three assignments of error in that court cover this point, and are as follows:

"1. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to the declarations alleged to have been made by Joseph Holt, but not until many years *after* the making of the will in controversy, as to actual or intended dispositions of his estate inconsistent with the will in controversy, as set forth in exceptions Nos. 2, 6, and 14.

"2. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations by the said Joseph Holt, but not occurring until many years *after* the making of the will in controversy, as to his then existing relations with and feelings towards certain of his relatives not named in said will, as set forth in exceptions Nos. 10, 11, 12, and 13.

"3. The court erred in admitting in evidence, as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations by said Holt tending to show the existence in his mind many years *after* the making of said will, but not before nor at the time thereof nor for many years thereafter, of hostile feelings towards persons nearly and remotely connected by consanguinity and affinity with persons named as beneficiaries in said will, as set forth in exceptions Nos. 4, 5, 15, 16, 17."

Until the brief on behalf of the caveatees in this court was filed there never was a suggestion made on their behalf that it was error to admit evidence as to Judge Holt's acts and declarations at any time prior to February 7, 1873, tending to show what his testamentary intentions actually were or what they probably would have been.

Again, from the beginning to the end of the brief submitted in this court on behalf of the caveatees, it seems to

be assumed that the trial court had ruled that declarations made by Judge Holt as to past facts were competent evidence to prove those facts. Several cases are cited in which it has been held that where a testator, after the date of an alleged will, had said that he had or had not made any will or had or had not made the particular will in dispute it had been held that such a declaration was not competent evidence to prove the fact of the execution or non-execution of such will; but the fact is that the counsel for the caveators during the trial did not at any time ask the court to hold, and the court did not at any time hold, that declarations of Judge Holt were competent for any such purpose. It was contended, and the court decided, that it was competent for the parties to show what were Judge Holt's testamentary intentions after the date of the will as well as before, and as to such subsequent declarations all that the court held was that they were competent for the purpose of showing what were his testamentary intentions at the time the declarations were made. Most of this evidence related to Judge Holt's conduct and declarations concerning his relatives, on the one hand, and the Throckmorton family and Miss Hynes and Devlin, on the other, but it was all admitted in connection with the evidence, pro and con, bearing directly upon the instrument in controversy to enable the jury to determine whether it was reasonable to believe that from February, 1873, till he died, in 1894, Judge Holt intended that his estate should go to the devisees named in that instrument.

As a clear understanding of this matter will of itself be a complete answer to that part of the brief on behalf of the caveatees in this court which deals with the admissibility of subsequent declarations of a testator when the issue is forgery, we proceed to refer the court to all that the record discloses bearing upon this point.

The first discussion of this subject exhibited by the record is in connection with the testimony of Mrs. Briggs, who testi-

fied that some time in 1881, when she asked Judge Holt some question about the Throckmorton family, he replied in a tone which made a great impression upon her at the time "I do not know the Throckmortons," and that some time during the administration of President Arthur, Judge Holt, at one of the President's receptions, when Major Throckmorton offered him his hand, refused to take it and turned his back on the Major (31, 36).

It will be seen that this testimony related exclusively to the feelings of Judge Holt toward Major Throckmorton and his family *at the time*, and could not by any possibility have any relation to any past transaction, except that it might be inferred from Judge Holt's feelings toward the Thockmortons there had been some antecedent trouble between them.

At the outset of the discussion as to Mrs. Briggs' evidence about what Judge Holt said to her, counsel for the caveators stated that they deemed it competent "as evidence of the declaration [intention] of the testator with reference to his will and the distribution of his property, *as tending to show his relations both with the persons named in his will and those who would under the law take his property if he had died intestate*" (32). In the course of the discussion the court said that the object of the testimony, as the court understood it, was "*by showing the relations of the parties*" to indicate that it was not Judge Holt's intention at the time of his decease that his property should go in the way in which the paper in controversy disposed of it (32). And further on in the same opinion the court said:

"Evidence of the declarations of a testator that would be either in favor of the will and its provisions, or against it; evidence of his relations with the beneficiaries under the will, or with his family, who would be his heirs-at-law; evidence of any declarations *that would indicate any purpose that he had with reference to the will*, must be received" (33).

The next declaration of Judge Holt offered in evidence was the declaration made to Mrs. Briggs, apparently some

time between 1888 and 1891, to the effect that his nephew, Washington Holt, would attend to his affairs after his death, and he, Joseph Holt, knew it would be all right (37, 38). So far as the record discloses, the discussion as to this evidence was mainly as to its bearing on the issue of revocation, and when the counsel for the caveators stated that they offered the evidence upon the question of forgery as well as on the issue of revocation, counsel for the caveatees simply submitted that it was not competent evidence on the issue of forgery without stating what the objection to it was (39). It will be seen that this declaration tended to show a strong feeling of affection toward and reliance upon Washington D. Holt by Joseph Holt at the time it was made.

Then follows immediately the stipulation of counsel that any declarations made by Joseph Holt after February 7, 1873, *as to his testamentary intentions* should be deemed to have been admitted, subject to the objection and exception last noted (39). The objection last noted, so far as the question of forgery is concerned, was a general objection, no ground whatever for it being specified (39).

Thereupon, subject to the stipulation just noted, counsel for the caveators gave evidence tending to prove the following declarations made by Joseph Holt between 1884 and 1893.

That Joseph Holt had told his nephew Washington that he had made him, Washington, his executor; that he had informed Washington Holt's daughter Mary and Washington Holt's wife, Vanda, that they would be much better off after his death; that they would then go to Europe; that he told Mary Holt that she must become proficient in French, so that while in Europe she could act as interpreter; that he had told the servants in his house that Washington D. Holt would have charge of his affairs after his death; and that about three months before his death he told Martha Scott, one of his servants, that his funeral was all in his will—that his will would not come out until after he was buried, and

that for that reason he wanted her when he died to see that a certain flag, which was in a trunk in his house upstairs, should be wrapped around his body (39, 40).

All these declarations, it will be seen, except the last one about the flag, tended to show great affection on the part of Judge Holt at the time they were made toward his nephew Washington and that nephew's family, and were inconsistent with the testamentary purpose manifested by the will in controversy. The declaration about the flag also tended to show that his testamentary intentions a few months before he died were not in accordance with that instrument.

It is important to note here that the same objection that was made to these declarations was made to the other evidence tending to show the relations between Judge Holt and the parties concerned after February 7, 1873. When that point in the case was reached, in the course of the evidence of Mrs. Iglehart, her testimony as to what took place in Washington, when she was here on her wedding trip, in 1874, was objected to "on the ground that testimony as to the relations between the testator and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue, for the reason that it threw no light on the question whether or not the testator executed the will in controversy" (54). This objection having been overruled by the court, it was then stipulated that the same objection should apply to all testimony of a similar character thereafter offered and admitted (55); and when the letters from Joseph Holt to his relatives were offered in evidence all those subsequent to February 7, 1873, were objected to, and "all testimony as to the relations between Joseph Holt and his relatives subsequent to that date were and each and every of the said letters and items of testimony was objected to on behalf of the caveatees on the ground that testimony as to relations between said Holt and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue,

for the reason that it threw no light upon the question whether or not said Joseph Holt executed the will in controversy" (61).

The objection made by the caveatees to the declarations of Joseph Holt in regard to having made Washington Holt his executor and other declarations tending to show that Washington Holt and his family would be financially benefited by his death are again stated on page 79 of the record, where the objection is thus worded:

"To the admission of which testimony as to the declarations by said Joseph Holt touching the disposition of his property after his death, the caveatees by their counsel objected, before the same was given, on the ground that such testimony was incompetent for the purpose of throwing any light upon the question whether or not the said Joseph Holt executed the paper-writing in controversy."

When the witness Martha Scott was asked as to the treatment of the Throckmortons by Judge Holt from 1882 until his death the evidence was objected to on the ground that it "could throw no light on the question as to the execution of the will" (82). So, when another of the servants, George Johnson, was inquired of as to the relations between Judge Holt and the Throckmortons between February, 1878, and December, 1884, it was objected to on the ground that it "threw no light" upon the execution of the instrument in controversy (83).

Mr. Barclay, for the caveators, deposed that in 1893 Judge Holt expressed warm regard for Mr. Barclay's aged mother, who had been Judge Holt's personal friend for many years, and remarked at that time that he had made his will and had by that will given some pictures to this old lady. The objection made to this evidence was that it was "inadmissible" (29).

We have now set forth everything in the record as to the objections made to evidence relating to Judge Holt's testamentary intentions after February 7, 1873, whether that

intention was manifested by his words or indicated by his conduct and feelings, and the rulings of the court thereon.

It clearly appears:

1. That no declaration by Judge Holt was offered as to whether he had or had not made the will in controversy.

2. That all of his declarations subsequent to February 7, 1873, offered in evidence by the caveators, tended directly to indicate what were his testamentary intentions *at the time the declarations were made.*

3. That all evidence as to the relations between Judge Holt and his relatives and between Judge Holt and the persons claiming under the alleged will after February 7, 1873, was objected to, and that the objection which was made to his declarations after that date was the same objection and made upon the same ground as other testimony tending to show what those relations were.

4. That it nowhere appears that at any time during the trial was it suggested that any declaration of Judge Holt was to be considered by the jury as evidence for any other purpose than to show his feelings and intentions at the time the declaration was made.

Nor is there anything to be found in the instructions of the court to the jury which indicates in the slightest degree that the jury were allowed to consider the declarations of Joseph Holt for any purpose other than that of showing his feelings and intentions at the time they were made. What the court said to the jury upon that question was as follows:

"You are also to consider the circumstances touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this will, up to the time of the date of this

will, bearing directly upon this question whether it would be likely that he would have made such a will at that time, and also the *subsequent conduct* of the testator towards his next of kin or heirs-at-law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood of his having made such disposition of his estate as is made by this paper in controversy" (131).

The Court of Appeals has not held that these declarations were competent for any other purpose than to show what was going on in the mind of Joseph Holt at the time he made them. In the opinion of that court it is said:

"But in a case where such proof [direct evidence of the execution of the will] is lacking or where by competent evidence the genuineness of the signature has been assailed to such an extent as to require the submission of the question of its forgery to the jury, we think the feelings of the testator towards all the parties and his relations with them, and apparent intentions as disclosed by his conduct and declarations, are competent for their consideration" (156).

And again:

"It follows from what we have heretofore said that testator's declarations tending to show the making of a will in Washington Holt's favor or appointing him his executor, were not competent to prove the execution of such a will either as a disposition of the estate or as a distinct revocation of the will offered for probate. *They were admissible, and seem to have been admitted only as one among other circumstances tending to show the state of mind of the testator* and shed light upon the issue of revocation by mutilation of the will offered for probate, and as such we have held them admissible on the issue in respect of forgery also" (159).

It is evident now that all that the caveators have contended for in this case, and all that the courts below have decided, is that testimony relating to Judge Holt's testamentary intentions subsequent to February 7, 1873, was competent evidence on the issue of forgery, as well as evidence relating to his testamentary intentions prior to that

date (which everybody conceded to be competent), and that his declarations after February, 1873, evidencing his testamentary intentions at the time they were made were not to be excluded, because in some instances they related to past transactions. It follows that the real question in the case is whether on the issue of forgery evidence of the alleged testator's testamentary intentions should have been confined to the period prior to February 7th, 1873.

Before proceeding to consider this question we wish to correct some of the errors contained in that part of the brief for plaintiffs in error which is headed "statement."

In the first sentence of this "statement" it is said that by the rulings of the trial justice a mass of testimony covering practically the whole life of the decedent was admitted in evidence after objection and exception of the plaintiffs in error.

Judge Holt was born in 1807 and died in 1894. We have already shown that the testimony as to the first sixty-six years of his life—that is, down to February 7, 1873—was admitted without any objection or exception.

It is stated on page 5 of the brief that the last thirty-four years of Judge Holt's life he spent alone, unattended by any relative, his household consisting merely of his domestic servants. The fact is that the testimony tended to show that several of his relatives, especially the members of Washington Holt's family, visited him frequently, sometimes staying six months at a time (69); that during the last five years of his life his nephew, William G. Sterett, and the latter's wife and children were constant visitors at his house (69); and that during the last fourteen years of his life neither Devlin nor any member of the Throckmorton family ever entered his door, except that on one or two occasions Miss Throckmorton obtruded herself upon him for a few moments (82–84).

On the same page of the brief it is stated that Joseph Holt espoused the Union cause with zeal and bitterness, while

his relatives allied themselves with the Confederacy. The bill of exceptions states that the evidence tended to prove that during the war Joseph Holt had not manifested any bitterness of feeling toward any of his relatives (49).

On page 6 of the brief it is said that Judge Holt, at the death-bed of his second wife, had promised to care for Elizabeth Hynes. The only evidence in the record upon this subject is the testimony of Mrs. Ray, a witness for the caveatees, that Judge Holt *told* her this in 1882. In view of the strenuous objection made throughout the brief in question to the admissibility of Judge Holt's declarations, it is somewhat singular that they should state to this court as a fact a matter as to which there is no testimony whatever except such a declaration. This declaration, of course, was competent only to show his feelings toward Miss Hynes at the time it was made.

On page 10 of the brief it is said that from 1862 to 1876, during the greater portion of which period Luke Devlin was a messenger in the office of the judge advocate general while Judge Holt was at the head of the office, Devlin "frequently met Judge Holt socially at the house of Mrs. Throckmorton, Senior, and occasionally called on him." As nobody but Devlin testified to this (22), and all the other testimony on the subject (43, 81) showed that it was untrue, it is misleading to state it to this court as a fact. There was not a particle of testimony in the case outside of Devlin's own testimony that he ever met Judge Holt at all after 1875 (84, 85).

On page 12 of the brief it is stated that the only correspondence of Judge Holt with his relatives prior to 1873 were certain letters, which are in the record. There was not a word of evidence to support this statement. The letters in question were the only ones that the record shows were produced and put in evidence. They were a few that had been saved during the period of over twenty years that

intervened between 1873 and the date of Judge Holt's death.

On page 13 of the brief it is stated that while Judge Holt lived in Mississippi, where his brother Robert resided, in the '50s, it does not appear that he ever saw any of Robert's children until after the war. Nor does it appear, so far as the record discloses, that he did not live at his brother Robert's house during the whole time that he was in Mississippi.

On page 16 of the brief and in many other places this court is informed that after Judge Holt's death two of his nephews, Washington D. Holt and William G. Sterett, burned such of Judge Holt's papers as they chose to destroy, and the impression is conveyed that they continued this destruction until stopped by one of the subordinates of the register of wills. What the evidence upon this subject was is not shown by the bill of exceptions. All that is said about it is that it tended to prove that "a number of private letters which said Holt had received from Washington Holt and family were burned in a coal scuttle in the yard by one Charles H. Strothers, one of the servants of the said Judge Holt; that some old newspapers and circulars were burned in a fireplace by the direction of said Washington Holt and Sterett; that no other of his papers were destroyed after his death" (80). The only other reference to this subject in the record is in the testimony of Strothers (87), where it is said that he testified that he burned about twenty-five letters in the coal scuttle in the yard by direction of Holt and Sterett, and saw some newspapers burned in the grate in the bedroom, and the testimony of Levy, an employé of the register of wills' office, that when he went to the house he saw that a considerable number of papers had been burned (48).

The rules of the Court of Appeals (like the rules of this court) are very stringent in their requirement that nothing shall be set forth in a bill of exceptions except what is necessary to an understanding of the questions of law brought to that court for review. No question of law was raised or

suggested during the trial in reference to the matter of the burning of Judge Holt's papers. The court was not asked to rule that any presumption of any kind arose from this circumstance. Testimony, therefore, that occupied many hours in giving was compressed into a few lines, because no question of law was raised in regard to it; and we submit that in the discussion of the case here it must be assumed that the evidence tended to show what the record says it tended to show, and nothing else. It must be held, therefore, that there was no evidence from which it could be argued that anything was destroyed except a few private letters from Washington Holt's family to Judge Holt, and some old newspapers and circulars.

Counsel say on page 82 of their brief that this "extraordinary"—this "all controlling"—fact of the burning of papers was ignored by both courts below. In justice they should have stated the further fact that so far as any question of law in the case was concerned it was also ignored by counsel for the caveatees. Its supposed importance is another of the discoveries made after the case came to this court.

In this connection we must controvert with emphasis the remarkable statement made on page 17 of the brief that from the time Judge Holt died to the present time the caveators "have been in absolute control of all his papers and effects." This reckless statement is made without reference to any part of the record which is supposed to support it. The fact is that all the papers of Judge Holt were taken charge of by his administrator, the National Safe Deposit, Savings and Trust Company, immediately after it was appointed administrator, in September, 1894, and that no one except the officers and employés of that company since that time has had access to the papers except by the consent of counsel on both sides. For months before the trial and during the trial, under a verbal agreement between the counsel for the respective parties, any of the counsel on

either side was allowed to examine the papers at his pleasure, and some of the counsel for the caveatees spent many days before the trial in the examination of the papers. During the trial it was further agreed that if the counsel on either side should produce a paper and state that it came from Judge Holt's papers that fact should be admitted without any proof. One of the officers of the National Safe Deposit, Savings and Trust Company shortly after the appointment of that company as administrator made a thorough search among the papers for anything of a testamentary character, but found no such paper, except the will of 1848 and a memorandum on a rough piece of paper containing the names of certain charitable organizations, with sums varying from $1,500 to $15,000 set opposite those names (80).

It is quite apparent from this misapprehension, and from many other things of a similar character in the brief, that, although the name of one of the counsel who participated in the trial is signed to the brief on behalf of the caveatees here, it must have been written by counsel who did not participate in the trial and was not familiar with what took place in court or between counsel before the trial began.

On pages 178 and 179 of their brief, counsel insist that Judge Holt's letters in evidence will be read in vain for a "syllable of suggestion" in the direction of his having made a will in favor of Washington D. Holt.

In his letter of October 16, 1881, to Washington D. Holt's wife, Judge Holt, writing from Washington city, said: "*I have a piano here as good as new which I wish Mary to have when I am gone*" (72).

Mary was Washington Holt's daughter. To us this letter seems marvelously like an instruction by Judge Holt to his executor.

While commenting on the absence of testamentary letters from Judge Holt to his relatives, it seems never to have occurred to Miss Throckmorton's counsel that it is somewhat

singular that not a letter of any kind from Judge Holt to her was produced at the trial.

On page 88 of their brief counsel say that it *unexpectedly* appeared at the trial that some of the caveatees had burned some of Judge Holt's papers. They do not assist the court by referring to the evidence, which tended to show that the caveatees were surprised by this evidence. The record does show that the letters which were destroyed were burned in the yard of Judge Holt's residence on the corner of C street and New Jersey avenue, and that the burning of circulars and newspapers was known at the time to an employé of the register of wills (80, 48). The reasonable inference would be that it was publicly known that papers had been burned in Judge Holt's house immediately after his death.

And if the writer of the brief in question will take the trouble to examine the files of any Washington newspaper for the week after the paper in controversy reached the office of the register of wills, he will find that column after column of matter relating to this burning of papers was then published, and of course came to the knowledge of the caveatees and their counsel. It is again obvious that the brief which sets up surprise on this point at the trial is not the product of counsel who participated in the trial.

And since counsel have dwelt so long on this subject it is well to remind the court that it is highly probable, to say the least, that this alleged will was burned in spots for the very reason that it *was* generally known that there had been some papers burned at Judge Holt's residence by those of his relatives who took possession when he died. Color would thus be given to the idea that in some mysterious way this particular paper had been saved from complete destruction in that way.

All these corrections are as to matters of fact not involving any of the questions of law with which alone this court has to deal in the case. So much space is devoted to them and to other questions which relate wholly to the facts, and

not at all to the rulings of the court at the trial, that it would seem that adverse counsel would like it to be seen how much better they could do at a second trial if this court would but give them a chance. If that were good reason for granting a new trial, few verdicts would stand.

THE ASSIGNMENTS OF ERROR.

We ask the court to note our objection to the form of the assignments of error contained in the brief filed on behalf of the plaintiffs in error in this court. There are fourteen of these assignments. Those numbered 1, 2, 3, 6, 7, 8, 9, 10, and 14 are to the rulings of the court in admitting certain evidence, but in no one of them is the evidence referred to set forth nor even its substance stated. Those numbered 4, 5, and 11 are to instructions given by the court or refused, but in no case are the instructions set forth or even their substance stated. The 12th and 13th are to the exclusion by the court of certain testimony offered in rebuttal. The testimony is not set forth, and its substance is very insufficiently and unsatisfactorily stated. We have been required, and the court will be required, to grope through the numerous pages of the record to which we are referred by these assignments, and we can seldom be sure that the counsel on both sides and the court will be dealing with the same subject-matter in considering any particular assignment.

ARGUMENT.

I.

FORGERY.

When the question before a jury is whether a paper propounded as a will is a forgery, and direct evidence as to the execution of the instrument is either absent or indecisive, resort to circumstantial evidence is not only justified, but is necessary. The most usual and the most important circumstantial evidence in such cases is that which relates to the testamentary intentions of the decedent before, at the time of, and after the date of the controverted paper. Such intentions can ordinarily be shown in but two ways: one by inference from the relations existing between him and the other persons concerned, and the other directly by his declarations as to what those intentions in fact are, and such a declaration is not to be excluded, either where it shows the decedent's feelings toward others or where it more directly states his testamentary intentions, because in addition it relates to past occurrences, as to which merely it would be hearsay.

We have seen that at the trial it was conceded by counsel for the caveatees that it was competent to show Judge Holt's testamentary intentions (and consequently the relations between him and his kinsmen and between him and the caveatees) prior to February 7, 1873. The caveators proved without objection that prior to the civil war the relations between Judge Holt and his family were as intimate and affectionate as is usual with persons standing in the same relation in which he stood to them; that though during the war all these relatives sympathized with the South and two of them were in the Confederate army, he had not

manifested any bitterness of feeling towards them; and that after the war and prior to February, 1873, his relations with his people were renewed (49, 50). They also proved, likewise without objection, that the person named as executor in the alleged will had been a messenger and copyist in the office of the judge advocate general while Judge Holt held that position, and that prior to February 7, 1873, there were no social or business relations between them (85).

So the caveatees proved, what was not disputed, that prior to February, 1873, Judge Holt for many years had provided for Elizabeth Hynes; that the relations between him and her were very close and affectionate, and that on the 7th day of February, and prior thereto, he held very affectionate relations with Major Throckmorton, his mother, his wife, and his two little children, one of them being the Josephine Holt Throckmorton named in the will; and generally each side put before the jury, without objection from the other, everything relating to Judge Holt's life from 1807 to February, 1873, that tended to show that it was likely that Judge Holt would not have made such a will as that which is in controversy.

Counsel for the caveatees at the trial, however, did consistently contend that evidence of this character should stop with the date of the alleged will, and they excepted to the rulings of the court admitting such subsequent evidence. But here it is important to note that their contention was that no evidence whatever was admissible as to the feelings of Judge Holt after February 7, 1873, either toward the beneficiaries named in the instrument in controversy or toward his own kindred, for the purpose of showing that it was not likely that he would have executed the will in controversy, or that it was likely that, if he made it, he would have revoked it.

They drew the line at the hour of the alleged execution of the paper in controversy (31, 32, 34, 39, 61, 79, 122, 138, 141, 142). That and that only was the question of law upon

which they asked for a ruling from the court on this part of the case. They insisted that such evidence must relate to a time "either anterior to the date of the will or cotemporaneous with it" (31). Neither during the taking of the testimony nor in the prayers for instructions, which were submitted to the court at the close of the evidence, did they suggest that such evidence might be competent if confined to a short or to a reasonable period or to any period whatever after the date of the alleged will. Yet in their brief they almost wholly abstain from discussing the point which they thus made. The great burden of their complaint in their brief is that the conduct and declarations of the testator were admitted on the issue of forgery at an *unreasonably long period* after February 7, 1873. They shrink from arguing here that upon which they stood at the trial—that the ears of the jury were to be absolutely closed as to everything that happened after February 7, 1873. But it is too late for them thus to shift their ground. The question here is whether the court below ruled properly on the points of law which were presented to it for determination during the trial.

In their brief here counsel for the plaintiffs in error, on page 108, correctly state that the caveators gave in evidence alleged declarations *and acts* of the testator tending, as they claim, to show his state of mind, feelings, and intentions subsequent to the date of the will in controversy, and that all this evidence was objected to by them. Yet it is remarkable that throughout the discussion of the evidence on the issue of forgery they confine themselves absolutely to that part of the evidence which relate to *declarations* of Judge Holt. Every case which they cite bearing upon the issue of forgery, and every paragraph of the text-books which they quote refers exclusively to evidence of declarations. Apparently they no longer contend as they did at the trial that it was incompetent to show that in 1874, when his niece, Mrs. Iglehart, came to Washington with her husband on their wedding

trip, that Judge Holt took them to his home and gave up his business and devoted his time to entertaining them, and that he was as affectionate toward them as any uncle could be, and that during that time he gave Mrs. Iglehart a handsome set of jewelry as a wedding present (54, 55); that from 1889 to his death Judge Holt's nephew, William Sterett, with his wife and three little children, lived at Washington and maintained with Judge Holt the most affectionate relations; that they visited him frequently at his house, and that he frequently went in his carriage to their house and took Mrs. Sterett and the children out driving; that he frequently made presents to Mrs. Sterett and the children (69); that Washington Holt and his family, after 1873, on many occasions, visited Judge Holt in Washington, and that Washington Holt's wife, being an invalid, remained at Judge Holt's house on one occasion for five or six months attended by physicians, whose bills were paid by Judge Holt; that Washington Holt's daughter Mary, in 1893, was living in Washington and visited Judge Holt every day and administered to his wants, and that down to the hour of his death nothing occurred at any time to interrupt the intimate and affectionate relations that existed between Judge Holt, on one hand, and Washington Holt and his family, on the other (69, 70).

It is manifest that counsel have been unable to find any authorities tending to support the position which they took at the trial, that the relations between Judge Holt and his kinsmen and between him and the Throckmorton family and Luke Devlin after 1873 could not be placed before the jury. They objected then to the declarations of Judge Holt upon the same ground upon which they objected to his acts. Both his acts and declarations were admitted as tending to show his testamentary intentions between 1873 and his death. Their whole contention was that his intentions during that whole period must be kept from the jury. They now shift their ground and claim apparently that the decla-

rations were admitted not for the purpose of either showing directly his testamentary intentions or showing them indirectly by manifesting his feelings toward the persons concerned, but for the purpose of showing that his statements as to past transactions were true.

Counsel for the caveatees at the trial did not ask the court to instruct the jury that the declarations of Judge Holt after February 7, 1873, were competent on the issue of forgery only for the purpose of showing Judge Holt's intentions as to the disposition of his property at the time they were made; and since those declarations were competent, as they now seem to admit, for the purpose of showing his feelings and purposes at the time they were made, they cannot complain here that the court did not in terms tell the jury not to consider them as evidence of the facts stated in them.

The general rule on this subject is thus stated in 2 Thompson on Trials, sec. 2338:

"It is a rule in the law of procedure, recognized and enforced in all jurisdictions, that in civil cases the judge is not bound to give his opinion to the jury upon any matter of law arising upon the evidence, unless requested to do so by one of the parties. Where no such request is preferred, the presumption is that the jurors are acquainted with the rules of the law applicable to the case, and the failure to instruct them cannot be assigned for error."

In further discussing the same subject the learned author of the work in question says:

"SEC. 2341. *Specific instructions must be asked for.*—It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that, mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impres-

sion, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate suppletory instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits."

This court has frequently and consistently held that the omission of the trial judge to properly instruct the jury on any question of law arising in a civil case is not ground of error when the court has not been requested to give such instruction. (See Armstrong *vs.* Toler, 11 Wheat., 276, 277; Castle *vs.* Bullard, 23 How., 172, 189, 190; Express Co. *vs.* Kountze, 8 Wall., 353, 354; Butler *vs.* Maples, 9 Wall., 766, 776; Shutte *vs.* Thompson, 15 Wall., 151, 164; Mut. Life Ins. Co. *vs.* Snyder, 93 U. S., 393, 395; Hartford Life Ins. Co. *vs.* Unsell, 144 U. S., 450, 451.)

In Pennock *vs.* Dialogue, 2 Pet., 15, Mr. Justice Story, delivering the opinion of the court, said:

"In the argument at the bar much reliance has been placed upon this evidence by the counsel for both parties. It has been said on behalf of the defendants in error that it called for other and explanatory directions from the court, and that the omission of the court to give them in the charge furnishes a good ground for a reversal, as it would have furnished in the court below for a new trial; but it is

no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it. The court cannot be presumed to do more in ordinary cases than to express its opinion upon the questions which the parties themselves have raised at the trial."

In the case of Potter *vs.* Baldwin, 133 Mass., 427–429, the supreme judicial court of Massachusetts thus disposed of a similar question coming before that court in a contested will case :

" Upon similar grounds, the evidence of a conversation the night before he died, in which he stated that he wished ' to see his son Joseph, and that he did not know but that he had been deceived,' was admissible to show his state of feeling toward his son and Francelia S. Lane. The wish to see his son might well be considered as showing a kindly feeling toward him (Lewis *vs.* Mason, 109 Mass., 169). While the declaration did not state by whom he felt that he might have been deceived, yet, when taken in connection with the evidence appearing in the case in regard to Mrs. Lane, it might have been found by the jury to refer to her and to exhibit his then state of feeling toward her.

" In proving the existence of that undue influence over a testator by which his will may be avoided, two things are necessarily to be shown, the extraneous words, acts or circumstances by which it has been exerted, and the effect thereby produced upon the mind of the testator, the former of which cannot, the latter of which may, be shown by his declaration. The difference is certainly obvious between receiving the declarations of a testator to prove an external fact, such as duress, fraud, or importunate solicitation, and as evidence merely of his mental condition. In the one case it is hearsay evidence, and open to all the objections applicable to that species of evidence, while in the other it

is appropriate and directly bears upon the issue to be tried (Waterman *vs.* Whitney, 1 Kernan, 157, 165).

"For the purpose for which it was admitted, the evidence was therefore competent. It is not to be inferred that it was applied by the jury to any other purpose. If these conversations were used at the trial by the counsel for the appellant in his argument for the purpose of showing undue influence and deception by Francelia S. Lane, such use was certainly improper. But the counsel for the appellee asked no instructions as to the use and effect of this evidence, nor did he, so far as the bill of exceptions shows, call the attention of the presiding judge to the matter. He cannot now object that it was not limited by the presiding judge in his instructions to the only purpose for which it was competent. If evidence be admissible for any purpose its admission cannot be made a ground of exception, unless it be shown that the judge refused to limit it to that purpose and permitted it to be used for a purpose for which it was not competent, against the objection of the excepting party (Howe *vs.* Ray, 113 Mass., 88; Packer *vs.* Lockman, 115 Mass., 72). As the evidence had been admitted for a purpose we deem to have been competent, and as no instruction was requested or given limiting its effect to that purpose, we cannot infer otherwise than that both the counsel for the appellee and the presiding judge deemed *that the purpose of its admission had been stated with sufficient clearness at the time it was received*, and that notwithstanding the argument of the counsel for the appellant there was no danger that the jury would be misled in its application. Had the counsel for the appellee thought differently he certainly should have called the attention of the presiding judge to the matter. Not having done so, he has now no just ground of complaint."

But as a matter of fact in the case at bar the court, in the general charge to the jury, did refer to this matter, and erred, if at all, by laying down the law too rigidly in favor of the caveatees. Thus, in instructing the jury upon the first issue, as to the genuineness of the document in controversy, the court, after referring to Judge Holt's character and attainments, and his letters that were in evidence, and the opin-

ions of experts and non-experts, and the evidence on both sides as to his relations to the various parties to the controversy prior to the date of the paper in dispute, told the jury that they were also to consider "the subsequent *conduct* of the testator toward his next of kin or heirs-at-law, as well as toward the beneficiaries under this will, as bearing upon the probability and likelihoood of his having made such disposition of his estate as is made by this paper in controversy" (131). It will be seen that the declarations were not mentioned at all, and were not included in what the court submitted to the jury upon this issue, except as they would bear upon the question of the conduct of the testator toward the parties to the controversy either before or after the date of the alleged will; and it was only when the court came to the other issue, the one relating to revocation, that the court told the jury that in that connection they "should take into consideration all the declarations of the testator, especially those made in the latter part of his life, in his last days" (135).

Counsel aver that the trial justice in this case was unduly influenced by what he considered to be the extraordinarily novel character of the case to open the door to evidence that should have been excluded. We shall show, we think, that this is a mistake; but something must be left to the discretion of a judge presiding at a jury trial when the issue joined must be determined by purely circumstantial evidence.

In the case of Moore *vs.* U. S., 150 U. S., 57, this court said:

"As intimated in the case of Alexander *vs.* The United States, 138 U. S., 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are

many circumstances connected with the trial, the pertinency of which a judge who has listened to the testimony and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in Castle *vs.* Ballard, 23 How., 172, 187, that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other.'"

In the case now before the court it has not before it even the words of the witnesses. Testimony which occupied more than a month in taking is here compressed into a few pages, showing in general merely what that testimony "tended to show."

Proceeding now to the consideration of the question of law raised at the trial as to the competency of the evidence that was objected to on the issue of forgery, we think we may safely say that there has not been found a single case in any court in which it has been decided that on the trial of an issue of forgery in a will case it is not competent to prove the testamentary intentions of the decedent after the date of the alleged will.

Cases there are in which declarations of the testator made subsequent to that time have been held inadmissible, but they are, without exception, we think, cases in which either the declarations were solely as to whether he had or had not made the will or they were treated by the court as declarations tending to establish the facts to which they related and not merely as showing the feelings or intentions of the testator at the time they were made.

On principle it seems impossible to exclude such evidence. It is far more important to know what were the relations between the supposed testator and the other parties after the date of the will than before. Long-continued affection on the part of the testator toward a person named in the will or long-continued hostility toward that person prior to and up to the date of the instrument in controversy may tend to show that it was or was not likely that he would have executed such a paper. If the inquiry be stopped at that moment, then it may reasonably be assumed that the affection, in the one case, or the hostility, in the other, had ceased to exist, although up to that time the change had not been manifested to others; but if it be made to appear that such affection or hostility continued unabated until the testator died, this conjecture is rendered impossible, *and the longer the period between the date of the will and the date of the death of the supposed testator the stronger the argument becomes.* He who proposes a paper as a will necessarily asserts not only that the supposed testator executed it at the time it bears date, but that it continued to be his intention till he died that his property should go as the will directs. Evidence, therefore, which tends to show that it is improbable he would die leaving such a will is as pertinent to the issue of forgery as evidence that it is improbable he would have made it at the time it bears date.

Adverse counsel dispute this in their brief. They have found here and there a case in which a man supposed that his will had been revoked when in fact no sufficient revocation had taken place, and they use these cases to show that the testamentary intention and the testamentary fact may be two very different things. It is of course true that an insufficiently executed will or a defectively revoked one may lead a testator into misleading conduct and declarations manifesting his expectations as to where his estate will go when he dies. But is such evidence to be excluded in every case for that reason? As well might it be said that

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declarations as to pedigree shall always be excluded because occasionally a family is under an erroneous impression as to the fact of a marriage or as to the paternity of a child. As well exclude all declarations against interest because sometimes such a declaration is not true and is made to mislead those who hear it.

It is conceded in the brief of our adversaries that evidence of this character is always competent when the issue is mental incapacity or undue influence. They themselves cite many cases in which it has been held that where the issue is undue influence subsequent declarations of the testator to the effect that he had not made the will freely or that he had been made to do it have been held competent as showing his state of mind at the time the declarations were made. In the few cases in which such subsequent declarations have been held inadmissible, where the issue was fraud or forgery, the fact that such declarations might bear upon the issue by showing the testamentary intentions of the testator at the time they were made has not been presented to or considered by the courts, and we think we may safely assert that in every case in which it has been so presented the testimony has been held competent. It would be strange, indeed, if after a man is dead and a will should be proposed, bearing his signature, by which he gave all his property to a stranger, to the exclusion of his children, that it should not be competent to show at the trial of the issue of forgery that he loved his children after the date of the instrument as well as before. Indeed, on the theory upon which this case is presented here by the other side, it would be error in such case to allow the jury to know even that the children lived after the date of the instrument, for the only purpose of such evidence would be to show that it was not likely that he would have forgotten them, and the whole burden of the argument is that that is not allowable.

On this subject that part of the brief which we are an-

swering is confined exclusively to *declarations* made by Judge Holt after February 7, 1873. We have seen that at the trial the objection went to all the evidence as to his relations with the parties concerned after that date; but certainly his declaration that he did not know the Throckmortons and that they were his enemies was just as competent for the purpose of showing his relations toward that family as evidence that they never visited him and that he did not allow them to enter his house; as competent even as Major Throckmorton's letter to Judge Holt of January 2, 1891, with which he was confronted after he had stated there had never been any serious difficulty between him and Judge Holt, and in which letter he said:

"After many years of separation I again approach you for assistance. * * * A terrible misunderstanding or misrepresentation has come between us" (110).

Indeed, counsel for the caveatees here seem themselves to think that evidence of declarations made by a testator after the date of the alleged will are competent, and, indeed, decisive, provided they are in favor of the will, for they say, on page 153 of their brief:

"If, however, the declarations were in effect such as showed knowledge or recognition by the testator of the disputed codicil, such evidence, of course, would have been admissible, not to prove the execution of the paper, *but simply to show knowledge of its existence and contents.* Knowledge of the existence and contents of the paper would fairly tend to indicate genuineness, because if forged, it would be extremely *improbable* that the testator should have had any knowledge on the subject, or even any means of knowledge."

Again, on pages 198, 199, they say, referring to a case in this court:

"It does not appear that this declaration was objected to, but it was plainly admissible as showing the testator's knowledge of the existence and contents of the codicil."

Counsel who wrote the brief from which these quotations are taken appeal earnestly to this court not to hold that declarations such as were admitted in the present case are competent evidence, because they anticipate that in that case great harm will be done in the future by having genuine wills broken by confiding juries who will believe trumped-up declarations in opposition to clear proof of the execution of a will; yet we find them conceding the admissibility of just such evidence where the danger is at least equally great. The forger of a will is not likely to have much difficulty in finding witnesses of his own kind to testify that they heard the testator declare that he made just such a will. Indeed, he can complete the case by giving such testimony himself.

Without expressing any opinion as to who was concerned in the forgery of this particular will, it may be mentioned, for instance, that Miss Throckmorton had a few moments' private conversation with Judge Holt in 1892, and that she testified that at that time Judge Holt told her "that he had provided for her, and that she would be perfectly independent" (116). We understand her counsel to admit that this was competent as tending to show Judge Holt's knowledge of the "existence and contents" of the will in dispute in 1892. We agree with them, but we fail to see how such evidence is admissible while other declarations made about the same time showing that he understood his will then in existence to make Washington D. Holt his executor and give Washington Holt's family large benefits should be excluded.

The reasoning of counsel leads to this further absurdity: They truly say that sometimes a man, with good reason, conceals his real testamentary intentions by declarations which he knows at the time are not true. Yet we now find them asserting that if, after his death, a will should be forged to fit the declarations as made they would be competent evidence to sustain it, while any inadvertent remarks on

the same subject that he might have made that were true would have to be ruled out.

It will occasion no surprise that no instruction was asked for at the trial of this case that the declarations of Judge Holt, made after February 7, 1873, were not admissible for the purpose of proving the truth of any statement that may have been contained in such declarations as to past transactions. In the case of Barbour *vs.* Moore, which is reported in 4 Appeal Cases D. C., 535, the effect of such declarations in will cases had been determined by the Court of Appeals, and that decision, of course, governed everybody at the trial of the present case. The counsel who represent the caveators in this case had both been of counsel, though on opposite sides, in the case of Barbour *vs.* Moore. At the trial of that case numerous declarations made by the decedent after the date of his alleged will were admitted in evidence, and the court at the trial, at the request of counsel for the caveators, instructed the jury that such declarations were competent only for the purpose of showing the "mental condition" of the testator at the time they were made, and not as proving or tending to prove the truth of such statements. On appeal the Court of Appeals construed this instruction to mean that the jury were to consider such declarations only as bearing upon the question of the mental *capacity* of the alleged testator and held the instruction to be erroneous, the court saying that such declarations are admissible "as showing the motives, feelings and designs of the testator."

It will be seen, therefore, that when this case was tried counsel on both sides and the court were advised that the appellate tribunal held such declarations admissible only for the purpose mentioned in the above extract from the opinion of that court. There was no contention made by anybody at the trial of this case that these declarations were

competent for any other purpose. It was not until in the appellate courts counsel who were not present at the trial came into the case that it was suggested that any of these declarations were proved for any other purpose than that above indicated.

The extent to which the declarations of a person may be offered in evidence as tending to show what is going on in his mind at the time is well illustrated by the decision of this court in the case of The Mutual Life Insurance Company *vs.* Hillmon, 145 U. S., 295. That case involved two actions upon policies of life insurance. The claim of the insurance companies was that the body which was found, and which was claimed to be the body of Hillmon, whose life had been insured, was really the body of a man named Walters. As a part of their evidence, they undertook to show that Walters had gone to the locality where the body was found in company with Hillmon, and that he had then disappeared and was never afterward heard of by his family and friends. To prove this part of the case, they gave in evidence to the jury certain letters written by Walters stating that he was going with Hillmon to the place referred to. The question in the case was whether these letters or written declarations were competent as evidence tending to prove that in fact Walters did go with Hillmon to the latter's camp. On that subject this court said :

"But upon another ground suggested they should have been admitted. A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant

the admission of declarations of the intention. *But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.*

"The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

"The letters in question were competent, not as narratives of the facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, *he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon*, than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question."

A similar question was raised in Commonwealth *vs.* Trefethen, 157 Mass., 180. In that case the inquiry was whether a woman whose body had been found had committed suicide. On the day before she disappeared she had stated that she intended to drown herself. The court held that this declaration was admissible in support of the contention that the death was caused by suicide, saying:

"If the day before her death she had written a note addressed to her mother, stating her conditition and declaring her intention to drown herself, and had left it in her desk when she went from home the following day, the admissibility of such a letter in evidence after proof that she had written it depends upon the same considerations as the ad-

See also Brown vs. Sutton.
129 U. S. 242.

missibility of evidence of similar oral declarations. Such a written declaration differs from an oral declaration only in this, that writing is often a more deliberate act than speaking; but this affects only the weight of the evidence. It may also be thought that speech is a less trustworthy indication of what is really in the mind of the speaker than acts or appearance; but this, if it be so, also affects the weight of the evidence."

We proceed now to consider the cases growing out of contested wills which, to our mind, support our contention that the declarations of Judge Holt, made after February 7, 1873, were properly admitted in evidence as tending to show his feelings and intentions at the time they were made.

In doing this we shall not confine ourselves to cases in which the declarations were admitted on the issue of forgery alone, although several such cases will be found in the list. Our opponents, in dealing with the competency of such declarations in cases where the issue is mental capacity or undue influence, seem to assume that the only purpose for which such declarations are admissible in these cases is to show mental weakness or mental vigor, yet running through nearly all such cases will be found rulings admitting such evidence for the purpose of showing the alleged testator's relations to the other persons involved and other evidence going to show the probability or the improbability of his making such a disposition of his property as the instrument in controversy directs.

In cases of alleged undue influence, for instance, the long-continued hostility of the decedent to the beneficiaries named in the will, or his long-continued affection for those excluded by it, is a fact which is always allowed to go to the jury with the other surrounding circumstances, and such hostility or affection is always allowed to be shown by the declarations of the decedent. Such declarations, we think, have never been excluded in will contests, whatever

the objection to the will, when offered only to show the feelings and intentions of the decedent when they were made.

In Adams *vs.* Norris, 23 How., 353–368, the question was whether a codicil to a will had been executed in accordance with the formalities required by law. The codicil gave certain real estate to a nephew of the testator. This court held that the declarations made by the testator after the date of the codicil, that he had given the land in question to his nephew, were admissible in corroboration of other evidence as to the fact of execution and the testator's knowledge of the contents of the paper.

In Mooney *vs.* Olsen, 22 Kansas, 77, Mr. Justice Brewer, in discussing the competency of the declarations of a testator in a will case, says:

"But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay, if not made on oath; *but a declaration which is sought as evidence of what the declarant thought or felt*, or of his mental capacity, is of the best kind of evidence."

A leading case on this subject is Collagan *vs.* Burns, 57 Maine, 449.

In that case it was found after the testator's death that the will had been torn and pasted together, and the question of fact was whether he had torn it himself, or whether his mother had torn it and he had pasted it together to preserve it. A jury having found upon the evidence that there was no revocation, the trial judge never-

theless refused to admit the paper to probate. On appeal by a divided court the verdict of the jury was affirmed and the will sustained. In the prevailing opinion it was held that evidence had been properly admitted to show that after the tearing and pasting the testator had said that his mother had torn the will in a tantrum and he had pasted it together; that he had said that he had given his wife his property, and that all he had was hers, she being the beneficiary under the will, and that he had made numerous declarations of continuing affection toward his wife (450, 451). The prevailing opinion held, in substance, that an intention to revoke, as well as a tearing, was necessary, and that the plaintiff's subsequent declarations were as proper to prove his intention as other circumstances; that unless such evidence be admitted spoliation will be triumphant, and that its exclusion is the resort of barbarism (457, 458); "that such evidence may raise an improbability, almost amounting to an impossibility, that the testator had destroyed his will," and so should be admitted at the trial (461, 462); that the objections to such evidence are the same as those formerly urged against testimony then excluded, but now received, the insufficiency of which is now almost universally acknowledged (465); that such testimony is always received when sanity is in question, and is just as liable to be false in such a case as in any other (467).

The dissenting opinions in Collagan *vs.* Burns are based upon the ground that the declarations in question were purely hearsay evidence and should be excluded for the same reason that such evidence is excluded in other cases. The principal dissenting opinion was written by a judge who had presided at a former trial of the case and who thought that the evidence the admissibility of which was in dispute was perjured testimony.

In Hoppe *vs.* Byers, 60 Md., 391, the whole question was whether the paper involved in the case was the genuine will of the alleged testator. The paper was in the shape of an

informal writing, without witnesses, and there was evidence on both sides on the question of handwriting. Numerous declarations alleged to have been made by the testator after the date of the paper were admitted in evidence at the trial. The court of appeals of Maryland held these declarations competent, saying:

"But apart from direct authority on the subject, if declarations of a deceased party are admissible in any case, or to any extent, or for any purpose, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present? This paper, if it be testamentary in its character (a question not now to be decided), can be effective only as a will of personalty. It does not profess to pass real estate and was not attested by witnesses. There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting by witnesses acquainted with it, was the only *direct* testimony by which the genuineness of the instrument could be established or assailed. Such testimony was offered, and we infer from the record, that a large number of witnesses, and perhaps an equal number on each side, testified upon this subject, those for the caveators swearing that to the best of their knowledge and belief the writing was not, and those for the caveatees that it was, the handwriting of the decedent. The jury had also before them on the same paper the admittedly genuine part of the letter and were at liberty to compare this with the disputed writing. But in this state of case was no other evidence admissible. Were the jury bound to decide the issue and make up their verdict upon such testimony alone and do the rules of evidence inexorably exclude from their consideration every other fact or circumstance that would tend to throw light upon the subject, so as to render it probable or improbable that such a paper was ever written by the deceased, or in corroboration of the direct testimony as to handwriting given on either side? We think not. It must be admitted that testimony as to handwriting, in any case of alleged forgery, though the best the nature of the case admits of, is usually the most unsatisfactory species of evidence courts of justice have to deal with. It is matter of common experience in such cases that witnesses of equal honesty and character, and with equal means of knowledge,

are found to testify both for and against the genuineness of the disputed signature. The difficulty and doubt are increased in a case like the present, where the instrument alleged to be forged is set up as a will which takes effect only after death, and where a forgery, if committed, would surely [seldom] if ever, come to the knowledge of the party whose testament it purports or is said to be. It seems to us that in such a case every collateral fact and circumstance which is not immaterial or irrelevant ought to be admitted, to aid the jury in reaching the *truth*, which after all is the object of every jury trial.

"The relation which Mrs. Beyers had occupied to the deceased, the feelings, whether friendly or otherwise, which during his life, he manifested towards her, are facts which are certainly not immaterial or wholly irrelevant, and where such feelings have been manifested, as they usually are, by declarations made to intimate and confidential friends who are clear and positive in their statements of them, and especially when made under such circumstances as to show that they were earnest and sincere, we see no good reason why they should be excluded from the consideration of the jury. So again, and upon the same ground, his declarations made before the date of the disputed paper, to the effect that he intended to give her a share of his estate, followed by declarations made after that date to the effect that he had done what he had said he would do, and had secured to her, or given to her, a share of his estate, were, in our opinion, *admissible* in evidence. In such case the *time* when the declarations were made is of less importance than in cases where *mental condition*, at a particular period, is sought to be shown. Of course more or less *weight* is attributable to them according as they were more or less remote from the date of the disputed writing, but their *admissibility* is not affected thereby. Entertaining this view of the law on the subject, we have carefully examined the declarations testified to by the several witnesses on the part of the caveators, and are of opinion they were each and all admissible. In this connection it is proper also to say that if the question were before us we should entertain no doubt as to the admissibility of the declarations offered on the part of the caveators, testified to by their witnesses as made after the date of the alleged testamentary paper."

Counsel for the plaintiffs in error devote a great deal of space to the discussion of Hoppe *vs.* Byers, and seem to think that it is the case principally relied upon by us to sustain the courts below in their ruling on the question of the admissibility of the testator's declarations in this case. We do consider it as a case entitled to great respect and consideration here, but it could be struck out from our brief without in the least affecting the strength of our case.

One criticism is made here upon the opinion in that case and upon that of the Court of Appeals in the present case in which we concur, and that is that they intimate that the admissibility of such declarations is dependent upon what is called direct evidence as to handwriting. We think that opinions as to handwriting are not properly direct evidence. They merely show that the handwriting of the disputed paper resembles that of the decedent. This is only a circumstance. The resemblance may be accidental or the result of fraud. Nor do we think that evidence which purports to show a certain state of facts is to be admitted simply because there is other proper evidence tending in the same direction, or that it is to be excluded because such other proper evidence is not obtainable. We contend that if all the opinions as to the handwriting of Judge Holt in this case had been in favor of the will in controversy his declarations would have been just as competent as if all those opinions had been that the instrument was a forgery. Nor do we think that even the presence or the absence of the testimony of witnesses as to the direct fact of the execution of such a paper can have any bearing upon the question of the admissibility of the testator's declarations, either before or after the date of the alleged execution of the will in dispute. But we radically differ with our learned opponents here as to the conclusions to be drawn from these premises. They seem to think it would be dangerous in the extreme to permit the testimony of living witnesses to the fact of execution, or opinions that the handwriting is genuine, to be

met and possibly overcome by mere oral declarations alleged to have been made by the testator. That the most solemn written declarations would be excluded by the rule that they lay down is a difficulty which they pass over in silence. But let us apply their reasoning to evidence which is universally conceded to be competent in such a case. Suppose that in this case General Grant, General Sherman, and Mrs. Sherman had been living when Judge Holt died, and that they and a half dozen other reputable witnesses had testified that they saw Judge Holt sign this paper and heard him at the same time declare that it was his will. Would such a state of facts make it incompetent to put on the stand on the other side some disreputable person, who twenty years before had seen Judge Holt write his name once, to give his opinion that the signature of the testator was not genuine? Would it have prevented us from placing upon the stand vagabonds to testify that at the time and place fixed by the witnesses in behalf of the will they had seen Judge Holt a thousand miles away? Clearly not. Yet no one would argue that for that reason opinion evidence as to handwriting and proof of an alibi should be excluded in every case. We might pursue this line of argument indefinitely. If the reasoning of our opponents here is good, by the same reasoning it could be shown that all classes of evidence are dangerous in the extreme and should therefore be excluded.

We do not care to follow counsel in their discussion of the cases and text-books cited in Hoppe *vs.* Byers, except in so far as they are otherwise referred to in this brief. It will sufficiently appear, even from what is said of these citations on pages 149 to 172 of the opposing brief, that the array of authority in support of the conclusion of the Maryland court of appeals is overwhelming, even without the many additional cases referred to in this brief. All the labor of counsel in this regard is thrown away, because the Maryland court held the declarations admissible for one purpose and counsel argue that ~~it was~~ they were inadmissible for another.

In the case of Scott *vs.* Hawke, 105 Iowa, 470, the will in controversy purported to have been executed by the testator by making his mark. The trial court instructed the jury to render a verdict against the will, because there was no competent evidence in the case of its execution. A petition for a new trial was filed, in which it was averred, among other things, that the proponent of the will had discovered that the testator had been shown the will by a man named Mohland, and had pronounced it to be genuine. Under the practice in Iowa the petition setting forth these facts was demurred to, and when the demurrer was overruled an appeal was taken to the supreme court of the State. That court held the evidence admissible, saying:

"The evidence of Mohland was both competent and relevant. The subscribing witnesses were dead, and other evidence of the execution of the will was admissible (Allison *vs.* Allison, 104 Iowa, 130). That the deceased, upon the examination of the instrument and the signatures thereto, declared it his will, is convincing evidence of its execution by him."

In Turner *vs.* Hand, 3 Wall., Jr., 88, Mr. Justice Grier, while trying a case on circuit in which, although five witnesses had testified to having seen the testator sign the will in controversy, it was claimed to be a forgery, charged the jury as follows:

"While it is undoubtedly true that parol declarations of a testator made before or after executing his will ought not to be received as a ground for altering or annulling it, yet cases *may* arise where such declarations, in connection with other circumstances, may be taken into consideration, as, for example, where there is strong evidence of conspiracy and of fraud practiced on the testator, or that the instrument is forged and false.

"In order to elucidate this principle let us suppose a case. A will is produced in court, regularly proved according to law, yet notwithstanding the legal proof it may possibly never have been seen by the testator, never have been signed and sealed by him, and consequently does not contain his

will as to the disposition of his property. Suppose it to have been made (as has sometimes been the case in Ireland and other places) by some person personating the testator, and simple and perhaps honest people have thus been prevailed upon to attest it. In such a case the signatures may be so palpably a forgery as at once to detect the fraud to any judge of handwriting. Again, suppose the will disinherits a child, a grandchild, or other relative, who has been the favored and beloved companion of the testator's life, whom he had uniformly pointed out and always and invariably, through his whole life, declared his intention of making his heir, and in whose favor a prior will was duly executed. Suppose the devisee in this supposed will was some worthless fellow, unknown to the testator, or, if known, despised or abhorred by him. Suppose the witnesses to be of the same character, low and degraded, with whom the testator never associated. Would not such facts, if clearly proved, condemn such instrument in the mind of every rational man? Would not the moral impossibility that the testator could ever have made such a disposition of his property be sufficient to outweigh the positive testimony of such witnesses?

"It is easy to forge the handwriting of almost any man so that it may be almost impossible for the best judges to discriminate between the false and the true, and it is too true that persons may be found willing, for a sufficient consideration, to swear to any statement of facts. Fraud can be generally proved only by circumstantial evidence. A number of distinct facts, clearly proved, may be so utterly inconsistent with the truth of the instrument as most satisfactorily to establish the fraud. The fact that the testator had uniformly, through his whole life, declared that he intended a certain relative to be his heir, that he made his will in his favor, may be an important link in the chain of circumstances from which fraud, perjury, conspiracy, and forgery may be clearly proved."

In Johnson *vs.* Brown, 51 Tex., 65, decided in 1879, in which the sole issue was as to the forgery of a paper offered as a will, the court held to be competent evidence declarations of the testator made before the date of the will, that the legatees never would have any of his property, and after

that date that they had colluded to rob him, but he would fix his property so that they could get nothing he had, and generally declarations of the alleged testator showing feelings of hostility toward the legatees. After considering the leading cases upon the subject, the court, on pages 79 and 80, says:

"None of the cases to which we have referred, however raise from the facts of the particular case as reported, the precise point now before the court—the admissibility of the declarations of the testator to invalidate a will upon the ground of forgery. But as remarked in Griffin *vs.* Stadler, 35 Texas, 706, they are generally cases which presuppose that there is no question or doubt as to the complete execution of the will. The authorities seem to be very few in which declarations of a party are sought to be introduced to prove that a will purporting to be his, is a forgery. This arises doubtless from the very nature of the case, as a will, being an instrument to take effect after death, would, if forged, rarely, if ever, come to the knowledge of the one who purports to be the testator.

"After full consideration of the question in this case, we are of opinion that the declarations of J. W. Warren before and after the date of the proposed will, expressive of feelings of ill will toward the beneficiaries, as were his feelings of kindness toward them, were properly admitted in evidence—not of themselves as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will as evidence of an independent collateral fact—the state of feeling between the parties—and which would in some degree tend to prove the issue before the court."

In the great case of Sugden *vs.* Lord St. Leonards, L. R., 1 P. D. (1876), 154, which was decided in 1876, the suit was filed to establish a lost will in connection with several codicils which were found in the testator's box where he kept his private papers. It appeared that the key to this box

was kept in a desk to which several persons, servants and others in the house, had access. The principal evidence of the contents of the lost will was the testimony of the testator's daughter, who was deeply interested in having the lost will established, but who was, notwithstanding, admitted by the counsel opposed to her to be a credible witness. She had read the will several times, and was able to state substantially its contents. Although her integrity was not assailed, her recollection was disputed. One of the principal questions in the case was whether it was competent to prove the declarations of the testator as to the contents of the missing paper for the purpose of corroborating the daughter. The case was first heard before Sir J. Hannen. He gave great weight to the declarations of the testator subsequent to the date of the lost will, which, if true, showed that the testator believed that a will containing the provisions of the lost will was in existence (198–203).

The case was heard on appeal from Sir J. Hannen's decree establishing the will. The principal opinion was delivered by Cockburn, chief justice. He, too, lays great stress on the testator's admission of his duty and intention to provide for his daughter, and his subsequent declarations that he had done so (218, 219); and as to the admissibility of these declarations, he holds that they are admitted to rebut the presumption of revocation when a will cannot be found, and says:

"The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule, where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position.

He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions he can have no motive for misrepresenting them, except in rare instances in which the testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

"It is upon this principle, I presume, that the declarations of a deceased testator have in more than one instance been admitted as evidence. Thus, they have been admitted, as in Doe *vs.* Palmer, 16 Q. B., 747; 20 L. J. (Q. B.), 367, to negative the presumption arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed *animo revocandi*, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus, if a testator were to say, 'When I am dead you will find my will in such a place,' or, 'I have left my estate of Blackacre to my son John;' or, 'I have left £5,000 to my daughter Mary;' such, or similar declarations would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made" (224, 225).

He then proceeds to hold that such declarations are admissible evidence as to the contents of a lost will (225–229).

In a concurring opinion Jessell, M. R., holds that the presumption of revocation is overcome by the evidence. He says:

"I am satisfied that the testator in this case died under the belief that he had left behind him a will disposing, in a manner satisfactory to him, of his whole estate. Every act of his life which is proved, every statement made by him which is proved, in respect of his testamentary dispositions,

to my mind point to but one conclusion, and to arrive at a contrary conclusion would be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence."

He next considers the several exceptions to the rule against hearsay evidence and the grounds upon which those exceptions are based, and says that the reasons for the several exceptions all apply to the case before the court (241, 242).

James, L. J., and Baggallay, J. A., concur in Chief Justice Cockburn's opinion, the latter stating that he wishes particularly to express concurrence as to the admissibility of the declarations of the testator (247, 252).

Mellish, L. J., concurred in the result, but he expressed his doubts as to the subsequent declarations, and practically dissented as to their admissibility for the purpose of proving the contents of the will; but he proceeds to make a clear distinction between such declarations as showing a present intention and those which relate to and are offered as proof of past transactions. Thus, on page 251, he says:

"I think there is a most material distinction, as was pointed out by Lord Campbell in Doe *vs.* Palmer, 16 Q. B., 747; 20 L. J. (Q. B.), 367, between declarations made before a will is executed, and declarations made subsequently. The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; *and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.* When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will. But, to my mind, they do not of themselves prove

what were the contents of the will; they only corroborate the other evidence which has been given of the contents, because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shews that he had it in his mind to make such a will at the time he made that declaration. But a declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; *it is simply a statement of a fact* within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that *hearsay evidence is not admissible to prove a fact which is stated in the declaration*" (p. 251).

Even this dissenting opinion, it will be seen, sustains our contention here. The declarations of Judge Holt, admitted in evidence, were admissible to show his intentions at the time they were made. They were not held to be competent for any other purpose.

In Gould *vs.* Lakes, L. R., 6 Probate Div., 1, which was decided in 1880, it was held that the declarations of a testator, oral and written, before and after the date of the instrument in controversy, that he intended to make his nephew his executor and residuary legatee, were competent evidence as tending to prove that a separate paper which purported to make the nephew executor and sole residuary legatee had been attached to the will by the testator with the intention of making it a part of his will. It was held that such declarations when made before the date of the will were admissible to show the intention to make the nephew executor and residuary legatee, and those made afterwards were competent to show his belief that he had carried that intention into effect.

In Southworth *vs.* Adams, 11 Bis., 256, a bill in equity had been filed under a statute of the State of Wisconsin to establish a lost will. It was held in that case that it is now settled law that the contents of a lost will may be proved by

the declarations of the testator made after the date of the will. The court reviews the cases at great length and shows that when a will is traced to the testator, and is not known to have passed out of his possession, it is presumed that he destroyed it, intending to revoke it, and that this presumption may be met by evidence to the contrary. It was held in this particular case that the presumption was overcome, the court laying great stress on a declaration made by the decedent on the day of his death that he had the will in his trunk.

The statute of Michigan relating to wills requires that the execution of a will before witnesses, and the other formalities required shall be "satisfactorily proved." Under this statute, in the case of Sullivan's Will (114 Mich., 189–193), it was held in a case in which the subscribing witnesses were all dead that the statute was complied with by evidence which included subsequent declarations of the testatrix. The last of these declarations was made shortly before the death of the testatrix and fourteen years after the date of the will, the court finding that these declarations indicated that the testatrix "understood what the paper was."

In the will of Cottrell, 95 N. Y., 329, the sole question was whether the will before the court was a forgery or genuine. There was an attestation clause in due form purporting to be signed by two witnesses, but they both testified that they had never witnessed the will, and that their signatures thereto were forgeries. The surrogate, nevertheless, held that there was evidence before him sufficient to overcome this testimony, and he admitted the will to probate. His judgment having been confirmed in the general term, the case was taken to the court of appeals. That court held that under the statutes governing the case it was confined to the question whether there was in the case competent evidence to sustain the judgment, and it held that there was such evidence, saying :

"The testator declared during his last sickness that the will, executed as he had described it, was either among his papers, or that he had given it to his executor."

In Burge *vs.* Hamilton, 72 Ga., 568, the will involved contained only ten pages, while the last page referred to it as containing pages numbered 1–11. In opposition to the will, it was contended that there was evidently a page missing, and that as the whole will was not before the court, it could not be admitted to probate. The court held that this difficulty could be explained and had been satisfactorily explained by evidence as to subsequent declarations of the testator, showing that the ten pages constituted the complete will. The court in its opinion, on pages 605–629, gives a long and able review of the cases in England and in Georgia bearing upon the question of the admissibility of subsequent declarations of a testator in analogous cases.

In Miller *vs.* Phillips, 9 R. I., 141, a will had been made by a single woman, who afterward married. By the law of Rhode Island the marriage raised a presumption that the will was revoked, but this presumption might be assailed or supported by evidence. The court held that the declarations of the testatrix made after she had married were competent and sufficient to show that her intention was that the will should stand. There seems never to have been any serious doubt that this is the law. (See Lugg *vs.* Lugg, 1 Ld. Ray, 441; Brady *vs.* Cubitt, 1 Doug., 31; Holloway *vs.* Clarke, 1 Phill., 399; Hall *vs.* Dench, 1 Vern. Ch., 329.)

On pages 124–147 of their brief counsel for the plaintiffs in error undertake to demonstrate that, in the appellate courts in seven out of eight States in which the question has arisen, a conclusion has been reached which is adverse to the ruling of the trial judge in this case, and the opinion of the court of appeals sustaining that ruling, as to the ad-

missibility of subsequent declarations of a testator where the issue is forgery.

The first case, and the one which seems to be principally relied upon, is the case of Boylan *vs.* Meeker, 28 N. J. Law, 274, a case which was decided in 1860, and the report of it occupies about 200 pages of the volume in which it is found. It seems from the history of the litigation over the will which was involved in Boylan *vs.* Meeker, as given in 4 Dutch., 477, that the majority of the judges who from first to last sat in the various stages of the litigation (including Mr. Justice Grier, of this court, in Turner *vs.* Hand, 3 Wall., Jr., 88) held the declarations of the testator made after the date of the will to be admissible.

And notwithstanding the contention to the contrary in the opposing brief in this case, we insist that an examination of the case, as reported in 28 N. J. Law, will show that of the four judges who determined the case one certainly—Vredenburg, J.—not only held them admissible, but gave them great weight in deciding the case, and that apparently Green, Ch. J., concurred in this view. Even the opinion of Whelpley, J., is based upon grounds which have no application to the present case, for on page 302 of the report he says that the trial judge told the jury that the subsequent declarations of the testator were not in evidence to show the execution of the will directly, but were important in showing that the decedent had no knowledge of its existence; and this Judge Whelpley says was error because the declarations referred to *merely showed that the testator did not mention the will, and therefore did not tend to show either a want of knowledge or a want of recollection by him of the instrument or its contents.*

"These declarations," says he, "prove that he spoke on many different occasions, to different witnesses, without mentioning his will of January. *They did not tend to show want of knowledge or recollection of it.* It is presumed that evidence of the same kind might have been heaped up *ad nauseam*,

but the increase of its quantity would not have added to its strength. The evidence of forty witnesses proving that he spoke without mentioning the will, would not come any nearer proving the proposition than that of one. A million of zeros added together are but zero, yet witnesses should not be convicted of perjury by showing that their testimony is in a high degree improbable.

"Hume did not disprove the miracles of the New Testament by showing that positive testimony in their favor was in the highest degree improbable. The testimony of four concurring witnesses unimpeached, of good character, having no interest in the case, ought not to be disregarded upon proof of the simple improbability of their story."

Indeed it is impossible to read any of the opinions in Boylan *vs.* Meeker without seeing that the conclusion reached was due almost altogether to the fact that the execution of the will in that case was proved by the testimony of so many-eye witnesses who were manifestly telling the truth that circumstantial evidence could not possibly overcome it.

Anticipating that we will claim that Boylan *vs.* Meeker does not sustain their contention, counsel refer to a later case in New Jersey—Gordon's case, 50 N. J. Eq., 397—as showing that it has since been held in New Jersey on the authority of Boylan *vs.* Meeker that the subsequent declarations of the testator are inadmissible where the issue is as to the execution of the will. That case was heard before the chancellor of the State, sitting as "ordinary," and was decided in 1892. Unfortunately for this claim, in 1897 there came before the same chancellor, still sitting as "ordinary," the case of Davis *vs.* Elliott, 55 N. J. Eq., 473—a case in which the sole question was as to the forgery of the will in controversy. The case was originally heard in the orphans' court of Camden county, where two out of three judges held the will to be a forgery, notwithstanding the fact that two subscribing witnesses testified to the execution of the will in their presence, the theory

of the contestants being that the subscribing witnesses had themselves forged the will and were endeavoring to make that crime effective by committing the additional offense of perjury. The will excluded the son of the testatrix. The trial court received and considered evidence as to the testatrix' relations with her son before the date of the will and from that time down to the hour of her death. Subsequent declarations of the testatrix were also introduced and considered—some in favor of the will and some against it. The "ordinary" reversed the judgment below, giving great weight to the fact that it was shown that the testatrix before the date of the will had declared that she was going to have one of the witnesses in question write it for her. As to the subsequent declarations, he says:

"Moreover it is shown by other entirely disinterested witnesses that after the date of the will, Mrs. Elliott declared that she had made a will."

The second of the eight cases is Johnson *vs.* Hicks, 1 Lansing (N. Y.), 150. That case was heard in the supreme court in general term for the eighth district of New York, before judges Marvin, Lamont, and Barker. There were two subscribing witnesses in that case, one of whom was dead, and the other testified to the due execution of the will. Each side introduced opinions of witnesses as to the genuineness of the signature of the testator, as well as that of the deceased witness.

The caveators offered to prove at the trial the declaration of the testator *before* the date of the will that he intended to give his property to the legatees, and that *after* the date of the will he declared he had made such a will, and who the witnesses were, and that the will was in the upper town of Lockport. The trial judge excluded this evidence as hearsay, and the Supreme Court sustained this ruling, saying:

"This is clearly and admittedly hearsay, unless it falls within some of the exceptions."

No suggestion appears to have been made in the case that the evidence might have been competent for the purpose of showing the testamentary intentions of the testator at the time the declarations were made. It will be seen, too, that the subsequent declarations did not mention any of the beneficiaries, but were naked statements by the testator that he had made a will; that certain persons had witnessed it, and that it was in a certain location. Evidently the whole argument which was made in support of the declaration was that it was competent to prove by such a declaration the fact of execution. In this case the declarations were not introduced for any such purpose. They referred to individuals, and were competent for the purpose of showing what were the feelings of the testator toward those persons at the time they were made, and were competent also for the purpose of showing the intentions of the testator at the same time.

The court, in Lansing *vs.* Hicks, held, it will be seen, that declarations before the date of the will were incompetent. That such declarations are admissible was not denied at the trial of this case. The case is at variance with the later cases in the same State. (See the foregoing pages of this brief, and see, too, *In re* Hesdra, 119 N. Y., 615.)

The third of the eight cases is Hayes *vs.* West, 37 Ind., 21. This was not a case of forgery at all. The caveator admitted that the testator signed the will, and the objection to it was that the formalities required by the law were not complied with in regard to the execution of the instrument. There were also issues as to undue influence and mental capacity. The jury found, in substance, that the formalities of the law were not complied with; that the testator was of sound mind; and that the will was the result of undue influence. The only declarations of the testator involved in the case

were those which he made *before* the date of the will. They were that he was satisfied with the laws of descent and distribution, and did not intend to make any will. He did not in the declarations refer to any person. The trial judge held these declarations admissible on the issues of insanity and undue influence, but not admissible on the question of proving or disproving the execution of the will. The supreme court reversed the judgment against the will, holding that the declarations were not admissible on the issue of undue influence, the court saying:

"The making of a will after the making of such statements certainly indicates a change of mind on the part of the testator. But does such change of mind carry with it any inference whatever that the change has been effected by undue influence? We think not. * * * Without change little progress would be made in civilization."

So it will be seen that this case holds incompetent declarations which in the case at bar were admitted at the trial by all parties to be competent evidence. It will also be observed that whether these declarations were competent on the question of forgery was not before the supreme court at all, the trial judge having excluded the evidence on that issue and the party offering it having obtained a verdict in his favor. An examination of the opinion will further show that, as in most of the earlier cases on this subject, counsel who offered the declarations failed to direct the attention of the court to the question whether they were admissible for the purpose of showing the feelings and intentions of the testator at the time they were made.

In the fourth case of McDonald *vs.* McDonald, 142 Ind., 55, there were several issues, one being forgery. The contestants admitted that the testator executed a will at the time and place and before the witnesses claimed by the proponent, but charged that that will had been destroyed or concealed by Mrs. McDonald, and that the will in contro-

versy had been forged and substituted for it. The contestants appeared in the case as devisees under the first will.

The contestants were permitted to prove the contents of the lost will by the subsequent declarations of the testator. That such declarations are admissible for that purpose the court held was supported by a multitude of authorities. (See pages 79–84 of the report.)

The court remarks incidentally, at page 81:

"It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud or undue influence (Runkle *vs.* Gates, 11 Ind., 95; Hayes *vs.* West, 37 Ind., 21)."

The declarations in the McDonald case were that the testator had given his widow a life estate in certain property. The missing will gave her such life estate, while the will which she propounded gave her a fee in the same property. The trial judge instructed the jury that the declarations as to the contents of the lost will were not to be considered in support of the other charges and issues in the case. The proponent requested a similar instruction, which was refused, and it was held that the instruction which was granted covered the ground satisfactorily. (See pages 85, 86.) So far as can be gathered from the report of the case, there was no discussion, either in the trial court or in the supreme court, as to the admissibility of such a declaration to show the feelings and intentions of the testator toward his wife at the time the declarations were made.

The fifth case is Johnson *vs.* Brown, 51 Texas, 65, which is discussed on page 49 of this brief. It holds subsequent declarations of a testator in the trial of the issue of forgery to be admissible for the purposes stated in the opinion. But counsel contend that the same court that decided that case six years later overruled it in Kennedy *vs.* Upshaw, 64 Texas, 411. In the latter case the sole question was as to the forgery

of a codicil to a will. The declarations admitted were made three days after the date of the codicil. The testator was asked if he had made any change in his will, and answered that he had not made such change and was not going to make any. It was held that these declarations were not admissible in evidence. Johnson *vs.* Brown was cited by counsel on each side of the case, but is not referred to in the opinion of the court.

We submit that these two cases, instead of being inconsistent with each other, furnish an excellent illustration of the distinction which was made at the trial of this case in reference to the purposes for which such declarations are admitted. The declarations in Johnson *vs.* Brown showed a strong feeling of hostility on the part of the testator toward the persons mentioned as legatees in the alleged will both before and after its date. The declarations in Kennedy *vs.* Upshaw refer to no person whatever, and do not directly or indirectly tend to show what were the testator's feelings or intentions toward any person named in the will or excluded by it. We have seen that the declarations in Kennedy *vs.* Upshaw were admitted for the purpose of showing the intentions and purposes of the testator at the time they were made.

It is clear that the reason Johnson *vs.* Brown is not referred to in Kennedy *vs.* Upshaw is that the two cases involve such different questions that the earlier one had no bearing upon the later decision.

In the present case no such declarations as those which were involved in Kennedy *vs.* Upshaw were offered in evidence.

The sixth case is Walton *vs.* Kendrick, 122 Mo., 504. In that case the sole question was forgery and the verdict was in favor of the will. The declaration that was relied upon was proved only by the testimony of the widow, who was the propounder of the will and the principal beneficiary under it. It was a declaration which, she testified, had been

made to her after the date of the will, and was in substance that the testator had told his daughter Katy to sign the will for him, and that he had seen her do it. The contestants, as to this evidence, asked the court to instruct the jury as follows:

"The court instructs the jury that the testimony of Mrs. Sarah Kendrick, contained in her deposition read in evidence, should not be considered by you *for any other purpose than to show the mental condition and state of the affections of John W. Price*, and that the said testimony is not competent for the purpose of proving that the said John W. Price executed the paper propounded as his will."

The trial judge refused to grant this instruction. There are several concurring opinions in the supreme court, and in one only (that of Brace, J.) is this question referred to. He holds that the ruling of the court below was erroneous, because he says such declarations are mere hearsay, "*so far as they are relied upon to furnish evidence of the facts they contain.*" This case therefore sustains our contention that these declarations are admissible, so far as they indicate the feelings, intentions, and purposes of the testator when he makes them.

The main question in the above case was whether there was sufficient evidence that the testator's daughter Katy signed her father's name *in his presence.* Of the seven judges in the case all but one concurred in holding that the declaration of the testator to the subscribing witnesses that it was his will and that he had had it written by his daughter was sufficient evidence from which the jury might infer that his name *was* signed by his daughter in his presence. This case, so much relied upon by our opponents in the present case, therefore, is as strong as any case to be found against their contention, because it holds that the declaration of the testator that he had at some time previously had the will written by somebody else, and that his signature had been affixed by another at his request, was competent as

evidence tending to establish those facts, and that such declaration also justified the inference that the thing he had merely said was done had been done in the manner required by law to make the will a valid instrument.

The seventh case is Leslie *vs.* McMurthy, 60 Ark., 301. In that case the sole question was forgery, and there was a verdict sustaining the will. But one question of law was presented on appeal, and that was whether the testator's declarations a year after the date of the instrument to the effect that he had made no will were admissible. It was held that the trial judge was right in excluding the declarations. From the very brief opinion in the case it is evident that the only question considered was whether the declarations were admissible as proving the truth of the testator's statement. The declarations referred to no person, and could not in any possible manner show what his feelings were either toward those who were excluded by the will or the beneficiaries under it. The court does not consider at all whether the declarations were competent for the purpose of showing the testamentary intentions of the testator at the time they were made.

The eighth and last case is Swope *vs.* Donnelly, 190 Pa. St., 417. There, too, the sole question was whether the will was a forgery. A verdict was rendered sustaining the will. The only declarations of the testatrix which were proved at the trial were one, made about two months *before* the date of the will, to the effect that she had a will in her possession giving her husband only what the law allowed him, and the other, made five years *before*, that she would not leave her money to her husband, and that she wanted her money to go to her own people. The counsel for the appellants in that case claimed only that the declarations were not admissible as evidence of the facts stated. (See p. 419 of the report.) The court in its opinion makes the same distinction, citing, with approval, Herster *vs.* Herster, 122 Pa. St., 239; Turner *vs.* Hand, 3 Wall., Jr., 88; Johnson *vs.*

Brown, 51 Texas, 65; Hoppe *vs.* Beyers, 60 Md., 381, and Taylor Will Case, 10 Abb. Pr. (N. S.), 300, in all of which cases it was held that such declarations are admissible for the purpose of showing the feelings and intentions of the testator at the time. It is quite evident from the whole opinion in Swope *vs.* Donnelly that the court was chiefly influenced by the fact that the declarations relied upon in that case were so few and, in part, so remote that they could not reasonably form the basis of a verdict in favor of the will.

In the case at bar the counsel for the caveatees at the trial conceded that declarations made before the date of the will were competent.

We cannot follow the details of the other cases mentioned in the brief for the plaintiffs in error bearing upon their objection to the declarations of Judge Holt as evidence on the issue of forgery. Several of them go much further than the trial judge went in this case; for example, Reel *vs.* Reel, 1 Hawks, 248, and Beadles *vs.* Alexander, 9 Baxter, 604.

The Taylor will case, 10 Abb. Pr., N. S., 300, is a decision by the surrogate, but it aptly represents the distinction which runs through all the well-considered cases on this subject and which we have endeavored to make clear. In Waterman *vs.* Whitney, 1 Kern., 157, all that the court actually decided was that declarations which were excluded at the trial should have been admitted; but even the *dictum* of the court in that case goes only to the point that declarations of a deceased person are not ordinarily competent evidence to prove anything but his mental condition or feelings at the time they are made. In that case the court says certain declarations are admissible when the issue is mental capacity or undue influence, but are not proper evidence when the issue is fraud to prove the fact of fraud.

In a later case, in Maryland (Griffith *vs.* Diffenderfer, 50 Md., 466), the court of appeals of that State held such declarations admissible in a case in which the sole issue left

standing was fraud, and referred to Waterman *vs.* Whitney as a case sustaining that conclusion.

Shailer *vs.* Bumstead, 99 Mass., 112, and Marx *vs.* McGlynn, 88 N. Y., 357, are leading cases in the same direction.

Dinges *vs.* Branson, 14 W. Va., 100, contains an exceedingly full and able discussion of the question. The court says (119, 120) that the fact that the declarations were made thirty years before or thirty years after the date of the will may not be too remote; that everything depends on the facts of the particular case.

There are many striking analogies favorable to the admission of such declarations, as on the question of the ademption of legacies (1 Red. on Wills, 540); when it is uncertain which of two or more persons of the same name the testator intended to benefit (*id.*, 560, 561); and in the case of a will executed by a blind person, when it is uncertain whether the testator knew what he was signing (*id.*, 567).

II.

REVOCATION.

It seems to us that on the issue of revocation there is nothing now for this court to decide. The jury having found the will to be a forgery, the issue as to revocation was out of the case, and their verdict on that issue was worded accordingly.

The suggestion that if this court should grant a new trial it should direct that the evidence be confined to the question of forgery, because the issue of revocation has been settled in favor of the caveatees, does not seem to us to call for any argument in reply.

Nor do we assent to the proposition that even if this court should affirm the judgment below the same questions may have to be fought over again between the same parties in a

suit involving the real estate. There are two reasons for this. In the first place, this paper can never go to a jury as a will of real estate, because there is no testamentary clause, and proof of the required formalities must fail; and, in the second place, the fact of forgery established by the verdict in this case, on principles too well settled in this court to require citation, would be *res judicata* in *any* other proceeding between the same parties, and it happens that in this case Joseph Holt's heirs and the distributees of his personal estate are the same persons.

For these reasons and because to our minds the observations which apply to the rulings of the trial judge bearing upon the issue of forgery must govern that part of the case which relates to the issue of revocation, we shall devote but little space to this branch of the argument.

We hold it to be well settled that—

After the death of a testator circumstantial evidence is admissible to show that any burning or mutilation of his will was done by him.

Our opponents do not, in so many words, dispute this proposition, but their arguments as to evidence of revocation leads necessarily to the conclusion that this is one question of fact as to which circumstantial evidence is to be altogether excluded.

They admit that the surrounding circumstances, including the purposes and beliefs of the testator, as manifested by his subsequent declarations, may be taken into consideration in determining the intent with which the burning or mutilation was done when it has once been shown that it was done by him; but, as we understand them, they think that that can be proved only by eye witnesses. They concede, as on all the authorities they are obliged to concede, that the condition of this paper "is sufficient for its effectual revocation so far as mere physical defacement is concerned," and that "if done by Judge Holt or any one else by

him authorized the presumtion of law that it was done with the intent to revoke would at once arise" (page 69, Brief for Plaintiffs in Error.)

Yet counsel, in support of their position here, cite numerous cases *in which the will was found intact* and in which the courts have held that where the will is not defaced at all declarations of the testator showing that he thought he had revoked it were not competent. So they cite other cases in which some attempt to revoke had been made which was insufficient in law to work a revocation, though done by the testator with intent to revoke. Clearly these citations are beside the mark in a case like this, where everybody admits that what was done was sufficient if it was done by the testator with the proper intent.

It is not disputed that ordinarily this question is determined in the first instance by a presumption. If the mutilated will is found among the effects of the testator or, if last traced to his possession, it has disappeared, two presumptions arise—one that he defaced or destroyed it, the other that he did so intending to revoke it. If, on the contrary, it is found in the possession of those who are interested adversely to it or is last traced to their possession and cannot be found, the presumption is that they defaced or destroyed it, and that they did so fraudulently.

There is still a third case—that is, the will is found torn in the hands of a disinterested third person. In that event, say counsel in their brief, it may be conceded for the purposes of the argument, "*the question might have been open, and no presumption either way would have attached*" (p. 81, Brief).

Finally, here we have a fourth case—nobody knows in whose possession the paper has ever been and nobody knows whence it came.

Now, in the first two situations the presumption of revocation, on the one hand, and of fraudulent mutilation or suppression, on the other, may always be rebutted or sup-

ported by circumstantial evidence, including the testamentary intentions and purposes of the testator shown by his declarations to the day of his death. This is not disputed. Why, then, should such evidence be excluded when the fact of the mutilation or disappearance of the will is before the court, but there is no presumption at all as to when, how, or by whom such mutilation or disappearance was brought about? It would seem that there is far greater reason for turning on the light when there is nothing on which to base even a presumption. The greater the darkness, the more the need of a lamp.

The importance of this consideration is manifest, for it is said on page 95 of the adverse brief that if there was any presumption in this case, "*much, perhaps most, of this evidence would have been admissible.*" They proceed to claim, however, that in the absence of evidence or presumption that Judge Holt defaced or burned this paper his declarations are inadmissible, because, they say, such declarations are competent only as throwing light on the intention with which the mutilation has been done after the fact of doing it has been otherwise established.

Yet we doubt whether in the multitude of cases to be found on this subject there is one which sustains this view of the matter. In the great majority of cases the question has been as to rebutting or supporting the presumption of mutilation or destruction by the testator, and in every such case we think it will be found that the circumstantial evidence, including declarations of the testator, has been addressed to the question whether he did in fact mutilate or destroy the paper, and not merely to the question with what intent he did such act. Most cases of this kind are settled as soon as it is known who is responsible for the mutilation or destruction of the paper. To illustrate this, we refer to a few of the leading cases on the subject.

In Lawyer *vs.* Smith, 8 Mich., 411, a will twenty-one years old was found, after the death of the testatrix, in a barrel

with a lot of waste paper. It was in several pieces when found. This instrument having been offered for probate, the contestants offered to prove declarations, oral and written, of the testatrix, made after its date, that she had destroyed it. This was excluded at the trial, and the trial justice also refused to let a witness answer the question whether the testatrix, after the making of the will, spoke of making any disposition of her property, and, if so, what she said. On appeal the supreme court of Michigan set aside a verdict in favor of the will, the court holding that the evidence which had been excluded was admissible as throwing light upon the question *whether the mutilation of the will was done by the testatrix*, and, if so, whether she did it by accident or design.

In Patterson *vs.* Hickey, 32 Ga., 156, the will in controversy was found with the testator's effects, but not among his important papers, and when found was torn into two pieces, but was otherwise perfect. The question was whether he tore it, and, if so, with what intent. At the trial the contestants of the will offered, and the court excluded, evidence tending to show that after the date of the will the testator had said that he "intended his children and grandchildren should share equally in his property," and that he had made other similar declarations. In a learned and exhaustive opinion the supreme court of Georgia held that this evidence was admissible, the justice who delivered the opinion closing his review of the case with these words: "I have not a scintilla of doubt resting in my mind that the testimony excluded should have been received by the circuit court."

In Harring *vs.* Allen, 25 Mich., 505 (1892), which was argued before Cooley, Graves, Christiancy, and Campbell, JJ., the question was whether a will which was shown to have been in the possession of the testator ten days before his death, but which could not be found after he died, was revoked. The admissibility of certain declarations of the testator being in question, the court say:

"There was, then, a question upon the truth of the statement, that decedent had destroyed the will, and also a question upon his intent to revoke. Now any declarations of decedent, adapted to disclose the state of his mind on the subject, would have borne upon the credit due to the statement, *that he tore the will*, and also upon his state of mind and intent in tearing the will, if he did tear it. Any free, intelligent and distinct expressions, manifesting approbation or disapprobation of the will, would have furnished more or less aid to the jury in their endeavors to ascertain, *whether in fact he did or did not tear the will*, and whether, if he did so, it was done with intent to revoke. For these purposes I think the inquiry was authorized. It is not pretended that any expressions of the kind in question could be used to establish specific facts embraced by the expressions. The point to which the evidence is referred, is the state and bearing of the testator's mind, whether favorable or unfavorable, to the will."

In Valentine's will, 93 Wis., 45, in which the question was as to the proof of a lost will, the court says, referring to evidence of subsequent declarations made by the testatrix as to whether she had destroyed the will:

"Where, as here, it is established that the testatrix properly executed a valid will, and the same was last known to be in her possession but cannot be found on her death, there is a *prima facie* presumption that she destroyed it with the intention of revoking it, but such presumption may be overcome by competent evidence, (*id.* [Cassoday, Wills], secs. 314–320, 356–367, and cases there cited). Of course, if such subsequent declarations are admissible in evidence to overcome such presumption, they are also admissible to support such presumption. True, upon the principles already stated in respect to admitting such declarations on the question of undue influence, her subsequent declarations to the effect that she had destroyed her will by burning the same, or by any of the other prescribed methods, would not be evidence of the fact so declared, much less, that such destruction was with the intent to revoke, *but they would tend to prove that she died in the belief that she had left no will, and thus support the pre-*

sumption of revocation arising from the fact that it was last known to be in her possession but could not be found upon her death."

It will be seen that the whole question in the above case was, *Who destroyed the will?* The declaration of the testatrix was not as to what her intention was in destroying the instrument, but as to whether she had destroyed it at all, and the opinion is another illustration of the principle hereinbefore applied to the evidence of such declarations where the issue is forgery that although they may expressly and directly refer to past transactions as to which they are hearsay, yet, since they show what the declarant thought and intended when he was speaking, they are nevertheless admissible for that purpose.

In Collier *vs.* Collier, 110 N. Y., 481, the will in question was made in 1863. The testatrix died in 1883, and the will, which gave the estate of the testatrix to the proponent, was last seen about seven months before the death of the testatrix. It could not be found after her death. The next of kin whose interests would have been adversely affected by the will were about the testatrix for a short time before her death, and were in the house where she died immediately afterward. It was held that the presumption was that the testatrix destroyed the will herself; that the burden was on the proponent to show that it was fraudulently destroyed by somebody else, and that it was not enough for the proponent to prove merely that the persons interested adversely to the will had had opportunities to destroy it. The proponent proved and the court considered declarations made by the testatrix during a period of nearly twenty years and up to about seven months before her death that she had made a will giving him all her property. The contestants proved and the court considered contrary declarations made by the testatrix up to a few days before her death. All these declarations were considered mainly on

the question whether the testatrix had destroyed the will. The court held that the proponent had not made out a *prima facie* case, and declined, therefore, to pass upon the competency of other evidence to which he had objected and which is not set forth in the report of the case.

In Tucker *vs.* Whitehead, 59 Miss., 594, the will was found in the testator's box where he kept his private papers. When found, which was after his death, the signature had been torn off. The heir whom the will injuriously affected had had access to the box, and the devisee named in the will charged that the will had been mutilated by the heir. The question was as to the competency of the testator's declarations bearing upon the issue of fact thus raised. The court said:

"Whatever may be the true rule where the act which the law accepts as itself evidence of a revocation is undoubtedly shown to have been done by the testator, we think it clear that testimony such as was offered here should always be received where, as in this case, it is uncertain whether the act was committed by the testator, or was the unauthorized or criminal act of a spoliator. The law makes the destruction or mutilation of a will by the testator sufficient evidence of a design to revoke it, and whether any declarations by him, other than those which accompany the act and thereby become a part of the *res gestæ*, should be receivable in evidence to contradict or explain the act, may well admit of doubt; but where the fact that he was the author of the destruction or mutilation is itself first presumed from the place where the paper is found, and upon this presumption there is built up the further presumption that it was done *animo revocandi*, it would seem that something more than presumptions should be let in. In such a case it is the part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth, since not to do so must in a great number of cases result in defeating the will of the deceased by accident or fraud. The evils which may spring from the introduction of parol proof in such a case are less than those which must be wrought by its exclusion. We append a few of the authorities permitting the introduction of the declarations

of the decedent in this class of cases, an examination of which will lead to those holding the opposite view. In the first case cited the argument on both sides is well summed up in the principal and in the dissenting opinions (Collagan *vs.* Burns, 57 Maine, 449; Lawyer *vs.* Smith, 8 Mich., 411; Weeks *vs.* McBeth, 14 Ala., 474; Patterson *vs.* Hickey, 32 Ga., 156; Steele *vs.* Price, 5 B. Mon., 58; Youndt *vs.* Youndt, 3 Grant's Cases (Penn.), 140; Tynan *vs.* Paschal, 27 Texas, 286)."

In a very recent case in the court of appeals of Virginia this question came up under novel circumstances. There was little doubt that the testator in that case had destroyed his will. The controversy was *whether he destroyed it before or after he became insane.*

While the court said that no objection had been made at the trial by either party to the declarations of the testator throwing light on the disputed issue of fact, and it was too late to raise the question of their admissibility in the appellate tribunal, it is quite evident that the court considered such evidence to be competent, for it treats some of the declarations as practically decisive of the case (Shacklett *vs.* Roller, 34 S. E. Rep., 492, Nov., 1899).

Other cases bearing directly on this point have been referred to in an earlier part of this brief. (See especially Collagan *vs.* Burns, 57 Me., 449; Sugden *vs.* Lord, St. Leonards, L. R. 1 P. D. (1876), 154; and Southworth *vs.* Adams, 11 Biss., 256.)

Such declarations were always received in the ecclesiastical courts in England. The probate jurisdiction of those courts was taken away by 20 and 21 Vict., ch. 77 (1 Wms. on Exers., *290). This is well illustrated by Hitchings *vs.* Wood, 2 Moore P. P. C., 355, to which counsel for the plaintiffs in error give so much space (See, as further indicating the liberality of the ecclesiastical courts in admitting this class of evidence, Loxley *vs.* Jackson, 3 Phill., 126, and Lillie *vs.* Lillie, 5 Eng. Ecc. Rep., 67.)

And since this jurisdiction was transferred to it the probate court in England has followed the same practice. (See Eckersley *vs.* Platt, L. R., 1 P. & D., 281, and Finch *vs.* Finch, L. R., 1 P. & D., 371.)

III.

THE COURT HAVING WITHDRAWN FROM THE JURY ALL OPINIONS AS TO THE GENUINENESS OF THE ALLEGED WILL, BASED EITHER WHOLLY OR IN PART UPON THE COMPOSITION OR STYLE OF THE PAPER, AND INSTRUCTED THEM TO DISREGARD IT, THE APPELLANTS HAVE NO JUST GROUND OF COMPLAINT, EVEN IF SUCH TESTIMONY WAS IMPROPERLY ADMITTED IN THE FIRST INSTANCE.

This court has several times held that where evidence has been improperly admitted against objection the error is cured by subsequently striking it out or instructing the jury to disregard it. In Penn Co. *vs.* Roy, 102 U. S., 458, the plaintiff, in an action against a railroad company for personal injuries, was allowed, against the objection of the defendant, to testify as to his poverty-stricken condition after being injured; but in instructing the jury the court told them not to take that evidence into consideration, and that the real question in the case was how much the plaintiff's ability to earn money in the future had been impaired. Mr. Justice Harlan, delivering the unanimous opinion of the court, said:

"Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the

court. To this position we cannot assent, although we are referred to some adjudged cases, which seem to announce the broad proposition that an error in the admission of evidence cannot afterward be corrected by instructions to the jury so as to cancel the exception taken to its admission; but such a rule would be exceedingly inconvenient in practice and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle or by sound reason and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

In Hopt *vs.* Utah, 120 U. S., 438, a physician was allowed to testify in a capital case that a blow on the head of the deceased, in his opinion, came from the left. The defendant was a left-handed man. This evidence was subsequently stricken from the record on the motion of the prosecuting attorney and the jury instructed to disregard it. The defendant contended that it was error to admit the evidence, and that the error was not cured by the subsequent action of the court; but it was held, first, that the evidence was admissible, and, second, that even if it was not, the error was cured by the evidence being stricken out with the accompanying instruction.

Mr. Justice Field, in delivering the opinion, said:

"It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it. We think the present case one of that kind" (438).

In New York, &c., R. R. Co. *vs.* Madison, 123 U. S., 524, where the action was for personal injuries caused by defendant's defective road-bed, the plaintiff, over the defendant's exception, was allowed to prove that after the accident the road-bed was put in a safer condition by the defendant's agent; but in submitting the case to the jury the court instructed them not to consider this testimony. It was held this cured the error; that "the jury could not have been misled on the subject."

So in Tex. & Pac. R. Co. *vs.* Volk, 151 U. S., 73, 77, the action being for personal injuries, the plaintiff was allowed to prove, over the defendant's objection, that the defendant's engineer and fireman had been retained in the defendant's service after the accident, and that they had not even been reprimanded. This evidence was introduced in support of a claim for exemplary damages. Subsequently the court instructed the jury that exemplary damages could not be allowed in the case. Mr. Justice Gray, delivering the opinion of the court, said that the evidence in question "became immaterial" by the withdrawal from the consideration of the jury of a claim for exemplary damages, and he cited in support of this conclusion the above-mentioned cases in 102 U. S. and 123 U. S.

To the same effect are many cases decided by the Mary-

land court of appeals. In Boone *vs.* Purnell, 28 Md., 629, 630, hearsay evidence having been improperly admitted, it was subsequently withdrawn by consent of the court, the opposite party excepting both to the introduction of the evidence and to its withdrawal. The court said, "We cannot see that any harm resulted to the appellants."

In Providence Life Ins. Co. *vs.* Martin, 32 Md., 310, 316, 317, in a similar case, the court said:

"The question then is, can a party who has offered testimony, oral or written, and induced the court to admit it against the objection of the opposite party, afterwards and before instructions are asked for and before the case has been argued by counsel, on discovering the supposed error into which he and the court had fallen, ask to have the same withdrawn from the jury, and is there any error in the court's action of which the opposite party has the right to complain in allowing and directing its withdrawal? In our opinion there is none, and the case falls directly within the decision in Boone *vs.* Purnell."

To the same effect are Sittig *vs.* Birkestack, 38 Md., 160, 161, and Herrick *vs.* Swomley, 56 Md., 464.

The rule thus laid down and constantly followed by this court and by the court of appeals of Maryland seems to be universal in this country. Some of the earlier cases in New York are apparently opposed to this view; but in Board of Water Commissioners of Detroit *vs.* Burr, 56 N. Y., 605, it was held that an error in admitting improper evidence was cured by the court telling the jury to disregard it; and in Gall *vs.* Gall, 114 N. Y., 109, 121, where evidence which had been received under objection and exception was struck out by the presiding judge on his own motion, it was held that this cured the error. The court said:

"Even when great care is used upon a trial, incompetent evidence will occasionally creep in. A witness may make a voluntary statement or an answer that is not responsive, or the trial judge may admit something the exact bearing of which he fails at the moment to perceive. Cannot this be

remedied by striking it out? Must the court stop in the midst of a long trial and discharge the jury because it is possible that the jurors, in violation of their duty, may give heed to evidence which is no longer in the case, but which was promptly struck out in their presence? Such a rule would seriously impede public business and lead to needless multiplication of trials. It would be opposed to the modern tendency both of legislation and judicial decisions."

All the cases cited by adverse counsel on this point are New York cases prior to the case last referred to.

In the case of Coughlin *vs.* Poulson, 2d MacArthur, 308, it was held that an error in admitting incompetent evidence was cured by the presiding judge instructing the jury to disregard it. In discussing the question, Mr. Justice Olin (himself an able New York lawyer), referring to the authorities which had been cited in favor of the appellant in that case, said: "I cannot but observe that all the adjudged cases cited in the argument upon this question were from the State of New York." He holds that even the New York cases as they then stood [before Gall *vs.* Gall was decided] established the doctrine that the withdrawal of evidence cures any error in admitting it.

It will be found on examination of the cases above relied upon by us that in all of them the evidence which was first admitted and then withdrawn was much more dangerous to the opposite party than the evidence which was withdrawn from the jury in the present case.

It may not be improper for counsel for the caveators to state why it was that after offering this class of evidence in the beginning of the trial they, toward the close of the case, requested the court to instruct the jury to disregard it. The difficulty which the case presented to the caveators at the outset is quite apparent. They were confronted with a document which several witnesses familiar with the handwriting of Joseph Holt testified was, in their opinion, genuine. There was no one who was willing to admit

that he knew anything about the paper from the time it was begotten until it reached the office of the register of wills. Able adverse counsel were contending that no evidence was competent upon the question of the genuineness of the paper which related to anything that happened after its date. If all such evidence had been excluded, there would have been left little but a controversy between experts and non-experts on each side as to handwriting. In this situation counsel for the caveators naturally felt it incumbent upon them to urge every piece of testimony which reasonably *might* be held competent evidence in their behalf. Upon careful reflection they reached the conclusion that the testimony of the kind under consideration was proper and competent evidence to go to the jury; that a man familiar with Judge Holt might well think that by the penmanship alone it looked like his handwriting, but from the language, style, and punctuation used be satisfied that he never wrote it, and yet be unable to convey to the minds of others the knowledge which convinced his own judgment. They therefore in good faith, and in the performance of a very responsible duty which they owed to their clients, argued and re-argued before the trial justice the question as to the admissibility of such testimony. The court, however, finally admitted all the evidence bearing upon the relations of Joseph Holt to the persons involved down to the date of his death. More important than all, the caveatees produced and put in evidence two letters from Joseph Holt to Major Throckmorton's wife, one bearing the same date as the alleged will, February 7, 1873, and the other dated September 29, 1873. Upon a comparison of these letters with the paper in dispute the counsel for the caveators became satisfied that it could be shown to a demonstration that the will was forged, and that it was forged by somebody who at the time had before him the two letters in question. They were satisfied also before the evidence was closed that they had demonstrated this fact to the satis-

faction of the court and the jury. They are prepared now to have those letters and the original will brought before this court, and to satisfy this court that the person who had those letters in his possession forged this will.

Following this came the disclosure that when Judge Holt died the Throckmorton family had in their possession a letter written by him on the 6th of February, 1873, from which it appeared that he intended on the following day to give a dinner party, and that he expected to have as guests at that dinner General Grant, Mrs. Grant, General Sherman, and Mrs. Sherman (117). Three of these four persons had long been dead and their names were attached to the alleged will. That they were selected because they were dead and because it could be thus shown that it was likely they were at Judge Holt's house on the day the paper was dated seemed a reasonable inference. It did not at all militate against this conclusion that when a careful examination of Judge Holt's memorandum books and papers was made it turned out that the dinner had been postponed till February 21, 1873 (117, 118), for that fact would not have been known to the forger.

Apparently to avoid the effect of these disclosures, Miss Throckmorton testified that the letters of February 6, February 7, and September 29, 1873, had been nailed up in a box in her closet for several years prior to the appearance of the alleged will (115). Finally the fact came out that Miss Throckmorton was in Washington for an hour on the 24th day of August, 1895, and that at that very hour the paper in controversy was deposited in a letter-box in that quarter of the city in which she then was (116, 119). The case then appeared to the counsel for the caveators to be too clear a one for their clients to permit them to longer run any risks as to evidence that might be at all doubtful. Under these changed circumstances they felt that it was no longer necessary for them to retain in the case evidence which had ceased to be

of any real consequence, and which, if they should obtain a verdict, might be used to have it set aside.

And why, after all, was this evidence not competent? Authorities on the direct point can hardly be looked for, because it is rarely, indeed, even in the case of forged wills, that the entire instrument purports to be in the handwriting of the testator. Usually only his signature is in question. Is not a man's manner of expressing himself as much a part of his identity as his face, or his voice, or his handwriting? Yet who can so describe the face, or the voice, or the handwriting of a friend as to enable others to identify him as well as he can himself? One of the most significant occurrences at the trial of this case occurred when Mr. Hitt was examined as a witness for the caveatees, and that was the emphasis which he laid upon the word *handwriting*, when he gave his opinion that this will is genuine (25, 26). It was quite evident that he was surprised to find Judge Holt's name at the foot of such a document, and that while the writing looked like Judge Holt's the contents of the paper raised a serious doubt in the mind of the witness as to whether Judge Holt ever wrote it. It is easy to see that the language of such a paper might render it certain that the man whose name is at the foot of it never composed it, and yet it might be utterly impossible to convey to the mind of the jury the reasons for such a conclusion. The Court of Appeals in this case declined to decide this question. It was not prepared to admit that opinions based on style and composition are not entitled to as much credit as those based on handwriting (160).

No opinions were offered in this case based upon style and composition alone. The few opinions which were not based on the handwriting alone were based on the handwriting and the composition taken together (41–43).

IV.

THERE WAS NO ERROR IN THE RULINGS OF THE COURT AS TO REBUTTAL EVIDENCE.

1. The evidence of P. Tecumseh Sherman was not competent in rebuttal, and the court properly excluded it.

This evidence was offered on the ground that it was in rebuttal of what John B. Randolph, as a witness for the caveators, had testified to in regard to a certain "quirl" and other characteristics in the genuine signature of General Sherman, as that signature had come under the observation of the witness as a clerk in the War Department. Mr. Randolph, of course, testified, as the record discloses, only from his own personal knowledge of General Sherman's signature. On his direct examination he had expressed the opinion that the signature of General Sherman to the paper in controversy was not genuine. On his cross-examination he had been asked his reasons for that opinion, and, among others, had stated that this flourish in the signature as it appeared on the paper in controversy was unlike the genuine signatures of General Sherman which he had seen; that "in four out of five of them the upper line in that upward stroke always touches the lower line" (85, 86).

It was attempted in rebuttal on this subject to show that it was not uncommon in the genuine signatures of General Sherman that this flourish should be made as it appears upon the disputed signature. We submit that this would not have been competent, even if the caveatees had offered to prove by the witness that from *his* observation of his father's genuine signatures he knew that this quirl was sometimes made as it is made in the disputed paper. That would not have contradicted Randolph, because he was speaking only of the signatures that he had seen. But no such offer was made. The offer

that was made was entirely consistent with the idea that the witness had been looking up his father's signatures and had found some in which this flourish was made as it is made in the disputed signature. But it needs no reference to authorities in this court to show that writings not in evidence in the case for some proper purpose cannot be offered or referred to as bearing upon the question of handwriting. If Mr. Sherman had produced a hundred documents bearing the genuine signature of his father, in which this flourish was made as it appeared on the paper in controversy, those papers would not have been admissible in evidence at any stage of the case. In rebuttal, as in their evidence-in-chief, the caveatees, like the caveators, could call witnesses to testify only as to their own personal knowledge on the subject of handwriting. If this witness in rebuttal had been asked whether he had any recollection as to how this particular flourish was made in the signatures of his father which had been made in his presence or in the course of correspondence with him, it is highly improbable that he could have answered the question in the affirmative. But no such question was asked him and no such proffer was made.

In the case of McDonald *vs.* McDonald, 142 Ind., 55, in which it was claimed that the signature of the alleged testator to the will was forged, a witness against the will testified that as far as his observation went the testator never wrote his signature without a break in the "onald." Thereupon the cross-examining counsel showed the witness a note and various checks of the testator, and, after the witness had examined them, asked him whether from his then present knowledge he would say that the testator wrote his signature without such breaks in the last letters of his name This question was objected to, and the answer was excluded at the trial on the ground that it would result in bringing in collateral papers as evidence as to handwriting. This ruling was held to be correct, the court saying (p. 71):

"For if the witness had stated that the signatures to the checks and note were not genuine, then, if appellants were entitled to use them for the purpose as insisted, surely they would have been entitled to controvert him by other evidence. And likewise, if he stated they were true signatures, to the appellees must be conceded the right to show the contrary, and hence at once the collateral inquiry would have arisen."

So in this case the proffer that was made was to show that the particular flourish in question "was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature" (103). And as to the other peculiarities of the signature of General Sherman, concerning which his son was called in rebuttal, the offer was in substance the same (104). All these offers, as made, were based—or at least, so far as the court was informed, may have been based—upon particular signatures which the witness had discovered and which would have been inadmissible because they were collateral.

But, aside from this, if in every case where a question of handwriting is involved, the parties after having exhausted their own evidence upon the subject, are to be allowed, ostensibly in reply to the testimony of their adversaries, to call witnesses as to every variation in every letter testified to on cross-examination by such adverse witnesses, there would be no end to such a trial. If a party who calls a witness in such a case chooses to content himself with having the witness testify that he knows the handwriting of the party, and that the disputed signature is, in his opinion, genuine, nobody but himself is to blame if afterwards he finds out that it would have been better for him to go into particulars. When, for instance, Mr. Sherman was called in the first place as a witness to his father's signature, he could have been asked to give his reasons for saying that, in his opinion, the signature was genuine. If he, in fact,

remembered that this particular flourish was made in the disputed paper in the way in which his father ordinarily or sometimes made it, he could then have so testified. If, on the other hand, his recollection of the signature was general, so that he could not go into details about it, then palpably he could not give competent testimony on that point in rebuttal.

Necessarily, questions relating to the admissibility of evidence in rebuttal must be in some degree within the discretion of the trial court (Dugan *vs.* Anderson, 36 Md., 588). The cases cited by the caveatees upon this subject seem to us to have no bearing whatever upon the point involved here. A case analogous to the present situation is that of Brown *vs.* Ward, 53 Md., 376, 386 to 390. That was a contest as to the validity of a will in which the caveator, having offered evidence as to the unreasonable hostility of the decedent to his relatives and his belief in spiritualism, was held precluded from going into those subjects in rebuttal in reply to specific evidence on behalf of the caveatees.

2. The evidence of Martha Scott in surrebuttal was properly admitted.

Martha Scott was a servant in the house of Joseph Holt for many years immediately preceding his death. She had testified that she had not seen the caveatee, Miss Throckmorton, at the house with any other person. In rebuttal the caveatees had placed upon the stand one Anna Tulley, who testified that in 1891, on two different occasions, she had gone to Joseph Holt's house with Miss Throckmorton, and that on both of these occasions Martha Scott was present (88). Martha Scott being in the court-room at this time, and for the first time having seen this witness, the court allowed her to be recalled and to testify that she had never seen Anna Tulley at Joseph Holt's house (118, 119). Every one knows that a forgotten meeting may be recalled by the face and voice of the person met. It would have been fair ground of argu-

ment on behalf of the caveatees if the caveators had not recalled Martha Scott after she had heard the story of the witness whom she contradicted.

3. The court committed no error when it refused to allow the caveatees to examine John A. Bingham as a witness in rebuttal in order that he might express his opinion as to the genuineness of the handwriting of the instrument in controversy.

The caveatees went fully into the question of handwriting in their evidence in-chief (21, 23). When the caveatees, after examining a single witness as to the handwriting of the alleged testator, announced their case closed, the court ruled that it was incumbent upon them to offer all the evidence at that time that they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the alleged will. Counsel for the caveatees accepted the ruling as being a matter within the discretion of the court. When Mr. Bingham was called in rebuttal the question that was asked him was as to whether the will was in Joseph Holt's handwriting (105). He was, it is true, asked as to his opinion, based upon the manner of composition as well as of handwriting, but the question was asked as to the handwriting and nothing else.

But it is unnecessary to pursue this matter further, for the reason that throughout the case the counsel for the caveatees contended that an opinion as to the handwriting of the paper, based in whole or in part upon its composition or style, was incompetent, and because of that objection, as has already been seen, all such evidence was finally withdrawn from the jury. There was therefore nothing to rebut.

V.

THE COURT PROPERLY ADMITTED IN EVIDENCE THE LETTER FROM JOSEPH HOLT TO MR. NICK RAY.

In relation to this matter, the learned counsel for the caveatees on page 93 of their brief fall into a singular error. They treat the letter of Joseph Holt of January 11, 1886, addressed to Mr. Ray, as though it stood by itself, whereas the importance of that piece of evidence depends upon its connection with another writing which was produced by the caveatees themselves and put in evidence by the caveators without any objection on the part of the caveatees.

Miss Hynes and Mrs. Ray had testified that in the spring of 1884 Joseph Holt gave to Miss Hynes $10,000 in District of Columbia 6 per cent. bonds (91, 94). Subsequently he conceived that he had been cheated by Mrs. Ray's husband in a financial transaction, and thereupon wrote to Mr. Ray the scorching letter in question. A copy of this letter in Joseph Holt's handwriting, which was offered in evidence, was found among his papers after his death, with endorsements, also in his handwriting, showing that the original of the letter had been mailed to Mr. Ray on January 11, 1886, and that no reply had been received. With this letter was also found Mr. Ray's note for $4,000 in favor of Joseph Holt, with endorsement in the latter's handwriting, showing that certain interest was due and unpaid, and that on the 25th of November, 1885, the original note had been sent by Holt to a lawyer in Lebanon, Kentucky, "for professional action." Counsel for the caveatees urge that there was no evidence that the original letter of January 11, 1886, had ever been received by Mr. Ray, overlooking the fact that the inquiry is as to Joseph Holt's feelings toward Mr. Ray, which are fully and emphatically manifested by the copy in his own handwriting of this letter, of which he retained possession until his death.

Mrs. Ray was a niece of Miss Hynes and one of her next of kin, so that if Miss Hynes should die intestate a part of her estate would go to Mrs. Ray, and thus practically to the benefit of the husband of Mrs. Ray.

On the cross examination of Miss Hynes she admitted that shortly prior to January 1, 1886, just about the time that Holt sent the note in question to a lawyer in Kentucky for collection, he, Holt, prepared for Miss Hynes, and she executed, a will, from which appeared two things of importance in this inquiry: (1) that Holt understood that the only property which Miss Hynes had, or was likely to have, were the $10,000 District of Columbia bonds in question; and (2) that Mrs. Ray was to be excluded from receiving any benefit from those bonds (93). Miss Hynes herself testified that she did not leave Mrs. Ray anything by that will "because said Joseph Holt wrote the will in that way" (93). Yet if, as the caveatees contend here, the will of February 7, 1873, was a genuine will and was then unrevoked, Joseph Holt left about $100,000 to go to Miss Hynes to do with as she pleased. Whoever reads the letter to Ray and Miss Hynes' account of the almost cotemporaneous communications between her and Holt about her will, and the will itself, can have no difficulty in determining the relevancy and the importance of the evidence. Certainly it was a fact which in the minds of some reasonable men might have had some weight in determining what were Judge Holt's testamentary intentions at that time toward Miss Hynes. It is not out of place here to quote the language of Mr. Justice Shepard in Olmstead *vs.* Webb, 5 App. Cas. D. C., 38, 49, which was referred to and approved in the subsequent case of Barbour *vs.* Moore, 10 App. Cas. D. C., 45:

"The remoteness in point of time is of little consequence compared with remoteness in point of causation, or relation to the question at issue. But some cases admit of and seem to require a wider range of evidence than others. Undue influence, coercion, fraud, and the like, naturally and ordi-

narily, are not susceptible of direct proof, but must be inferred from circumstances. Consequently, as has been well said, 'any fact, no matter how slight, bearing at all on the point at issue, and not wholly irrelevant, may be admitted. But the circumstances, when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact they are offered to establish' (Davis *vs.* Calvert, 5 G. & J., 269, 304). In a later case, wherein this doctrine is affirmed, the same court said: 'Undue influence is generally proved by a number of facts, each of which, standing alone, may be of little weight, but taken collectively may satisfy a rational mind of its existence' (Moore *vs.* McDonald, 68 Md., 321, 329). In such a case, too, much must be left to the sound discretion of the trial judge, who is called upon 'to discriminate between such facts as are merely collateral and foreign to the issue and such as are connected with it' (Davis *vs.* Calvert, *supra*)"

If this be the rule where undue influence or other fraud is charged, how much stronger is the case when a jury has to deal with a will bearing date more than twenty years before the testator's death, all the alleged witnesses to which are long dead, to which there is no attestation clause, and which, so far as the evidence discloses, was never seen by any one till it came to the court anonymously and covered with marks of suspicion?

It is to be observed here, too, that counsel for the caveatees overlook the fact that the evidence in question at their request was taken from the jury altogether, so far as any issue in the case was concerned, except the issue of revocation (125). As the jury never reached that issue, the evidence became wholly immaterial.

VI.

THE JUDGMENT APPEALED FROM SHOULD STAND, BECAUSE UPON THE WHOLE CASE THE PROBATE COURT SHOULD HAVE REFUSED TO ADMIT THE ALLEGED WILL TO PROBATE, AND THE JUSTICE PRESIDING AT THE TRIAL IN THE CIRCUIT COURT SHOULD HAVE REFUSED TO ADMIT IT IN EVIDENCE, OR SHOULD HAVE INSTRUCTED THE JURY AT THE CLOSE OF THE EVIDENCE TO RENDER A VERDICT IN FAVOR OF THE CAVEATORS.

We have now reached the question stated on page 4 of this brief which our opponents have not discussed at all, and which we think should control the case.

It is conceded by our adversaries (44, 50, 52 of their brief) that the ecclesiastical courts of England never allowed a will to go to probate when the only evidence connecting it with the testator was the opinions of witnesses as to the handwriting. They assume that this is a rule which will not obtain in a court governed by the rules of the common law.

This assumption is made without warrant. No case has yet been found, apparently, in which that question has arisen in a common-law court. The cases referred to on pages 34, 49, 51 of the brief for the caveatees, in which, as in the case at bar, the will came from an unknown source and was connected with the testator only by such opinions, were all cases in the ecclesiastical courts.

There is no question that of all kinds of evidence there is none more nearly worthless than opinions as to handwriting, either of experts or non-experts. In this case Hagan, one of the experts produced by the caveatees, testified that—

"A skilled expert could imitate the handwriting of another so that an ordinary observer could not detect the difference unless it was explained to him and shown to him

under a microscope, and that the science of forgery had got down so far that it takes an expert with his microscope to detect it when it is well done" (99).

When, therefore, a year after the death of a testator, a paper purporting to be his will, but dated more than twenty years before his death, comes to light under such circumstances as to make it impossible to trace it back a step further, and there is no evidence in its favor, *except* opinions as to handwriting, to allow it to go to probate would put the estate of every man at his death at the mercy of scoundrels who could forge wills and mail them anonymously without the slightest danger to themselves—wills so closely imitating the handwriting of the supposed testator that those who knew that handwriting best would be deceived by it. It would be necessary to imitate only the *signature* of the testator. In wills of personal property no witnesses are required in this jurisdiction. It can readily be seen that if this should be held allowable a new industry would spring up which would yield large and quick returns, with small labor and no risk.

But in this particular case the alleged will is burned and mutilated, and its seal, if it ever had one, has been removed. It is conceded by our opponents that if these defacements were the work of the supposed testator and were done by him with the intention of revoking the will they would be sufficient for that purpose; and it is everywhere laid down that if a will be found so burned and mutilated among the papers of the decedent a presumption arises that he himself did the act *animo revocandi*.

But here it is not known from what source the paper in dispute comes. Assuming it to have been once the will of Joseph Holt, no one gives any information tending to show whether it was mutilated while in his possession, or while in the possession of persons interested in its destruction, or while in the custody of disinterested persons.

We submit that in such a situation the proponents of the will must fail for two reasons. In the first place, they must make out at least a *prima facie* case, and this requires them to show not only that the paper was once the will of Judge Holt, but that it was such will when he died. Since as to the last proposition they have no evidence and are not helped out by any presumption, they are in the same position as any other plaintiff who has the burden of proof and fails to introduce sufficient evidence to make out a *prima facie* case.

In the second place, other things being equal, the law presumes innocence rather than guilt, and will therefore rather impute the burning and mutilation of this paper to Judge Holt than to another, for it would have been right for him to do it, but a gross fraud for anybody else to do it without his authority.

The presumption against guilt is not confined to criminal cases. Whenever a situation arises even in civil cases in which, owing to the absence of positive evidence, it is necessary to resort to presumptions, and there are but two possible presumptions, one involving wrong-doing and the other excluding it, the latter will be adopted (1 Greenl. on Ev., sections 34, 35 (note *a*), 38*a* (note 2), 41, 80; Best on Ev., section 302 (note V); Lawson on Presumptive Ev., 93, etc., ch. V).

In this case the will, assuming it to be genuine, is traced to the possession of the testator. Necessarily it was in his possession when he executed it. In the absence of evidence to the contrary it must be presumed that it remained in his possession till he died. Indeed, this was admitted by counsel for the caveatees during the trial. After the argument on the question of the admissibility of the testator's subsequent declarations, the court, in deciding the question, said:

"This situation is unique. It is conceded that the presumption is that the will was in the possession and custody

of the testator at the time of his death, but it is not conceded that at that time it was in its present condition" (33).

Therefore counsel for the caveatees, while contending that it is to be inferred that the will was in the possession of the testator at the time of his death, are asking the court to further infer that it was subsequently mutilated by somebody else. This involves a direct finding of fraud and crime. It is respectfully submitted that the presumption must be to the contrary.

In Bennett *vs.* Sherrod, 3 Iredell, L., 305, the court say:

"The authorities cited by the counsel for the appellant show that, where a will has been duly executed and left with the testator, if it be mutilated in his lifetime while in his possession, or upon his death, if it be found among his repositories canceled or defaced, in such cases, in the absence of other proof, the testator is presumed to have done the act, and the law further presumes that he did it *animo revocandi;* and if the repository of the will was at the same time accessible to the testator and another person and the mutilation was done in the lifetime of the testator, the law would presume that it was done by the testator. He had a right to do it, and a fraud will not be presumed in the other person."

So in Knapp *vs.* Knapp, 10 N. Y., 279, this language was used:

"It is true, as was contended by the counsel for the defendant, that it is a fact for the jury ultimately to pass upon and find whether the will is or is not shown to have been fraudulently destroyed, or rather this becomes ultimately a question for the jury in all cases where the party adduces sufficient evidence in the case to entitle him to go to the jury upon the question. If, on the contrary, the evidence so far fails to make out this fact that the court would feel itself constrained to set aside the verdict of the jury if they were to find the fact in favor of the party seeking to show the will fraudulently lost or destroyed, then the court upon

the trial may properly refuse to leave this question to the jury, and even do what was done by the learned justice upon the trial of this cause—arrest the trial at this point by refusing to permit the party to go into evidence to prove the will."

And in Bauskett *vs.* Keitt, 22 S. C., 193, the same doctrine is thus laid down:

"In this case there was no allegation or evidence tending to show that the will had been destroyed by accident, but the whole case of the plaintiffs depended upon their being able to show that the will was destroyed by the heirs-at-law because it was to their interest to do so. This would have been a criminal act on their part, and to establish it there must be evidence satisfactory to the tribunal (in this case the jury) entrusted with the trial of the issue. Indeed, the very ground upon which the rule is based—that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it—is that the law will presume that an innocent rather than a criminal act has been done. Hence in such a case the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs-at-law, even though they might have an interest so to do, and might by reason of their close relations to the testator have the best of opportunities of so doing, because if they did it their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence."

In the case of Scoggins *vs.* Turner, 98 N. C., 137, the supreme court of North Carolina expressly decided that where a stranger was shown to have had the same opportunity to take and destroy the will that the testator had, yet in the absence of any evidence the presumption in favor of innocence must govern and the will must fall.

In the great case of Colvin *vs.* Fraser, 2 Hagg., 140, 141, 143—a case which involved an estate of the value of nearly six hundred thousand pounds sterling, and which received

Lee McIntosh vs. Moore,
22 Tex. Civ. App. 57 (Oct. 1899)

a degree of consideration not exceeded in any other case to be found in the ecclesiastical reports—Sir John Nicoll expressly says that the reasen for assuming, in the absence of evidence, that a missing will was destroyed by the testator himself is that the court always presumes innocence rather than fraud.

Much is said by the counsel for the appellants about the danger to the community if the precedent be established that after men are dead their wills may be set aside by evidence of the character which was relied upon by the caveators in the present case; but far more dangerous to us all is the doctrine for which they contend, that when a document like this comes to the probate court secretly from some guilty hand after a man's death, bearing the names of witnesses long dead, never, so far as is known, having been seen by mortal eye from the day of its alleged execution until the day of its appearance—burned, mutilated, without seal, pasted together—it is to be presumed to express the wishes of the testator at the time of his death, and that that presumption cannot be met except by direct evidence of eye-witnesses that the mutilation was done by the testator.

Even on the first issue, as to the execution of the paper, it was, we submit, the duty of the court below to have refused the probate of this paper. There was no testamentary clause. Proof of the genuineness of the signatures of General Grant, General Sherman, and Mrs. Sherman did not therefore tend to prove the genuineness of the paper itself. There was nothing to indicate whether those names were placed on the paper before or after the signature "J. Holt" had been put there. The only evidence, therefore, that could be offered to the court in support of the document was that as to handwriting, and where there is any dispute about the handwriting, and there is no other evidence, a court of probate should not receive the document as a will.

In Machin *vs.* Grindon, 2 Lee's Eccl. R., 406, the court went further than this and refused to admit a codicil to probate in common form where the only evidence in support of the document was the testimony of the beneficiary and there were suspicious circumstances. In that case the testator had lodged in a room in Grindon's house, and Grindon testified he found the codicil in a bureau in that room, there being no evidence of the finding except Grindon's. After the death of the testator, Pickering, Grindon had procured a number of Pickering's letters, and "there was a great similitude between those letters and the codicil." Sir George Lee, the presiding judge, held that the circumstances indicated forgery; that, supposing there were no suspicion at all of any indirect practice, there was not evidence enough before the court to establish the paper, "for it stood solely upon a doubtful proof of handwriting, the most uncertain species of proof;" and he added:

"The court had never established a paper not found in the deceased person's custody nor supported by any circumstance upon a controverted evidence of handwriting, and in this case the evidence that it was not Mr. Pickering's handwriting is as strong as the evidence that it was."

A case much resembling the one at bar is that of *in re* last will of Solomon Sublette, an unreported case in the probate court at St. Louis, Missouri. Sublette died in 1857, and, no will appearing, his estate was settled up by an administrator, the administration being finally closed in April, 1866. Nearly thirty years afterwards a certain Mrs. Ewait presented for probate a paper purporting to be a will made by Sublette, dated April 15, 1856, which had come to her (or her attorneys) by mail from an unknown source on or about March 6, 1895, the will being in Mrs. Ewait's favor. In support of the paper some evidence was offered as to the genuineness of the signature of the testator. The court re-

fused to admit the paper to probate, and in so doing delivered a written opinion. The following are quotations from it:

"Who was the custodian during these many years when the law required the production of the paper if a genuine will? What was the reason for withholding the same from probate when the death became known shortly after the date of the will? If genuine, duty under the law required its production.

"If fictitious, the danger of detection in the perpetration of a great fraud was manifestly greater shortly after the death than it is now, when nearly two score years have removed many, if not all, those who could have testified against the fraud. If the custody was a proper one, why should the custodian conceal himself? These questions, which are suggested by the appearance of this paper at that time in the manner in which it came to light, lead me not only to the conclusion that it does not come from such custody as to afford a reasonable presumption in favor of its genuineness, but, *on the contrary, it raises a strong presumption that the paper was not genuine*, and that it is subject to just grounds of suspicion."

So we contend that in this case that if this paper had been offered for probate in common form and no one had appeared against it, it would have been the duty of the probate court to refuse to admit it to probate. It has been the rule of that court time out of mind to require in every case satisfactory evidence of the genuineness and due execution of a will before admitting it to probate, whether there is any opposition to it or not. Usually that satisfactory evidence is found in the testimony of the subscribing witnesses or some of them, or where they are dead and there is an attestation clause in evidence as to their signatures.

But here no such evidence was possible, and the date of the paper, its burned and torn condition, the apparent removal of its seal, the careful pasting together of its severed or almost severed parts, and the mysterious way in which it

reached the court, all pointed so strongly to fraud or crime in connection with it that it would have been the duty of the court to require explanation from those who attempted to use it without even the formality of calling on those whose birthright it would take away.

J. M. WILSON,
A. S. WORTHINGTON,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 21.—October Term, 1900.

Josephine H. Throckmorton and Luke Devlin, Plaintiffs in Error, *vs.* Washington Holt et al. } In error to the Court of Appeals of the District of Columbia.

[March 25, 1901.]

This was a proceeding in the Supreme Court of the District of Columbia for the purpose of proving an alleged will of the late Joseph Holt, a distinguished lawyer and for many years Judge Advocate General of the United States Army, who died at the age of eighty-seven, in Washington on August 1, 1894, after a residence of many years in that city. The proceeding resulted in the rejection of the paper on the ground that it was not the will of Judge Holt but was a forged document, and judgment refusing probate was entered upon the verdict of the jury. The proponents of the will appealed to the Court of Appeals of the District, but before the appeal was brought on for argument Miss Hynes, one of the legatees named in the will, withdrew her appeal. The judgment of the Supreme Court upon the appeal of the other proponents was subsequently affirmed by the Court of Appeals, and the proponents of the paper, excepting Miss Hynes, have brought the case here by writ of error.

The record shows that Judge Holt died leaving no relatives nearer than nieces and nephews, residents of the States of Indiana, Mississippi and Kentucky, and of the city of Washington, D. C., all being respondents in this appeal. He had been twice married and both wives had died long prior to his own demise. He had no children by either wife. Immediately upon his death his nephews, Washington D. Holt and William G. Sterrett, came to his late residence in Washington, and the keys being delivered to them by one of the servants, a strict search was made for a will but none was found. While the nephews were in possession of the house and the search was going on for the will, papers were burned and destroyed, all of which the nephews testified were wholly unimportant, and consisted of letters from relatives of Judge Holt to him, and that no papers destroyed were of a testamentary character. No will having been found, the nephews above named, and another, named John W. Holt, filed a petition in the Supreme Court of the District of Columbia, holding a special term for orphans' court

business, in which the fact of intestacy was stated and the appointment of an administrator was asked. Pursuant to the petition and on September 28, 1894, the National Safe Deposit, Savings and Trust Company of the District was appointed administrator of the estate, and has continued so to act since that time.

Up to August 26, 1895, nothing out of the ordinary occurred in the administration of the estate, but on the last mentioned date a sealed envelope, addressed to the register of wills in Washington was received by that officer, which envelope was postmarked "Washington, D. C., August 24, 6 P. M. 1895, L." The envelope was opened by the register who found therein a paper purporting to be a will signed by "J. Holt," dated February 7, 1873, and on the paper appeared what purported to be the signatures of Ellen B. E. Sherman, U. S. Grant and W. T. Sherman as witnesses. By this paper Judge Holt gave one-half of his estate to Lizzie Hynes, her real name being Elizabeth Hynes, and the other half to Josephine Holt Throckmorton.

Lizzie Hynes had been left an orphan in infancy and had been committed to the care of her uncle, Dr. Harrison, and his daughter, the first Mrs. Holt, and she had taken special charge of the child up to the time of her own marriage to Judge Holt, who had promised his wife at the time of their marriage to care for the child, and Mrs. Holt upon her deathbed asked and received a promise from Judge Holt that he would always take care of Lizzie, and treat her as if she were his own daughter. From that time until his death Judge Holt fully and in all things kept his promise and always supported her, she living most of the time in Kentucky, though frequently visiting and traveling with him.

The other beneficiary, Miss Throckmorton, was Judge Holt's goddaughter, her mother being the cousin of his second wife, and while her father was a young man Judge Holt treated him with great kindness, and always so treated Miss Throckmorton.

The following is the text in full of the alleged will, with punctuation as in the original:

"In the name of God Amen

"J, Holt, of the City of Washington D. C. being of sound mind declare this to be my last will & Testament

"I do hereby give devise & bequeath all of my property—both personal & real to Lizzie Hynes—cousin of my first wife & to Josephine, Holt, Throckmorton—who is my God-child & to their heirs & assigns forever—I do hereby direct that at my death all of my property be divided equally between them.—

"Lizzie Hynes is to inherit hers at my death Josephine at the age of 21, her Father Maj. Charles B. Throckmorton will hold her share in trust—

"I appoint Mr Luke Devlin of the City of Washington D. C. whose

character I believe to be of the highest standard & who will I am certain carry out my wishes my executor

"Signed & sealed by me in the presence of these witnesses in the City of Washington, D. C.

"Feby 7th 1873—

J. HOLT

ELLEN B. E. SHERMAN
U. S. GRANT
W. T. SHERMAN"

There was nothing in the envelope addressed to the register of wills other than this paper. The postmarks on the package indicated that it had been deposited in one of the many local mail boxes to be found in the northwest quarter of the city of Washington, which is quite a large district, running from North Capitol street on the east to Georgetown on the west, and bounded on the south by the Mall and north by the boundaries of the city. When the paper was taken from the envelope it bore evident signs of mutilation by burning and tearing, and although the paper recited that it was signed and sealed, there was no seal on it, and if it ever had been affixed it had been torn away. At the time the paper bears date, February 7, 1873, Ellen B. E. Sherman was the wife of W. T. Sherman, who was then [illegible]eral commanding the army of the United States, and U. S. Grant was then President. The paper was torn nearly in two across the page between the signatures of the testator and that of the first witness. Some of the evidence tended to show that the tearing was complete, but, as stated by the court below, the weight of the evidence was that it was not entirely separated at one end. The burning appeared on the edges of the paper and at the top, but the body of the instrument was so far intact as to be plainly legible.

Upon the receipt of this paper by the register of wills he communicated with Mr. Luke Devlin, the person named therein as executor, and after the latter had seen it he communicated with the parties interested, and on September 20, 1895, filed his petition in the Supreme Court of the District of Columbia, held for orphans' court business, for the probate of the paper as the last will and testament of Joseph Holt, deceased.

The contestants, as next of kin, filed their caveat October 18, 1895, opposing the probate of the paper, to which answer was made and filed December 2, 1895, by Luke Devlin, the executor, and by the Misses Hynes and Throckmorton, the two legatees named in the paper.

Issues were duly made up in the orphans' court and transferred to the Circuit Court for trial by jury. They are as follows:

"1. Was the paper writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?

"2. Was the execution of said paper writing procured by fraud exercised and practised upon said Joseph Holt by any person or persons?

"3. Was the execution of said paper writing procured by the undue influence of any person or persons?

"4. If the said paper writing was executed by the said Joseph Holt as his last will and testament, has the same been revoked by said testator?"

Upon the trial of these issues the proponents of the paper proved the death of the subscribing witnesses, and gave evidence in regard to the genuineness of their signatures as well as of Judge Holt's. Senator John Sherman testified to the genuineness of the signature of his brother, General Sherman; Colonel Frederick D. Grant to that of his father, President Grant, and P. Tecumseh Sherman to that of his mother, Mrs. Ellen B. E. Sherman. Mr. Henry B. Burnett testified that in his opinion the body of the will and the signature of the testator were written by Judge Holt; that he became acquainted with him in 1863; had frequently seen him write and had had considerable correspondence with him which continued up to 1889, and that he was familiar with his handwriting. After this evidence was given counsel for proponents offered the paper in evidence, which was objected to by counsel for the contestants on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated, and had been sent to the register of wills anonymously, and that it was incumbent upon proponents to explain these circumstances before the will could be read to the jury. The objection was overruled and the paper read in evidence.

Elizabeth Hynes, one of the legatees and proponents, was called and testified that the paper writing was never in her possession, and she never saw it until it was shown her on the witness stand at the trial.

Miss Throckmorton also testified that she had never had the paper in her custody and had never seen it until it was shown her by the register of wills in the latter part of October, 1895, and that the first she knew of its existence was through a telegram from Mr. Devlin, which she received in New York city, August 26, 1895; that she had known Luke Devlin when she was a child but had not seen him since until after the paper was filed.

Mr. Devlin, the person named as executor in the paper writing, also testified that it was never in his possession, and that he first saw it in the office of the register of wills on the day it had been received there. On cross-examination Devlin testified that he knew Joseph Holt well since 1862, having been a copyist and messenger at that time in the office of the Judge Advocate General when Judge Holt succeeded to that office; that he continued to be employed in that office until 1876, when Judge Holt retired therefrom; that he had little communication with him in relation to office matters; that he visited Judge Holt once or twice at his house; that he was in the habit of meeting him socially at the residence of Mrs. Throckmorton, Sr., the grandmother of Miss Josephine H. Throckmorton,

from 1865 to 1878; that he had not seen Mrs. Throckmorton, Sr., more than four or five times during a period of ten years preceding the receipt of the will at the register's office, and on learning of the existence of the will he had to consult the city directory to ascertain where she then lived; that on the day the will reached the register of wills he received a telephone message from the register, went to his office, and saw the will for the first time. He called on Mrs. Throckmorton, Sr., and on the same day telegraphed Miss Josephine H. Throckmorton of the finding of the will, having first learned her address from her father upon inquiry at the War Department; that he called on several occasions in later years at Judge Holt's house, and was informed by the colored servant that he was out or that he was engaged, and asked witness to call again, the last of these visits being about April 9, 1894, shortly before his death; that he had met Judge Holt outside on several occasions, the last of which was about two years before his death, and conversed with him.

At this point the proponents announced their *prima facie* case closed, but opposing counsel objected that it was incumbent upon the proponents to put in all their testimony essential to the establishment of the alleged will before contestants were called upon to offer any; whereupon the court ruled that because of the fact that there was no attesting clause to the will, it was proper and necessary for the proponents to offer all the evidence they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the will, and counsel for the proponents accepted the ruling as being a matter within the discretion of the court.

Testimony was then given by Elizabeth Hynes, who stated that she had corresponded with Judge Holt for forty years, and that in her opinion both the body of the will and the signature were in his handwriting. Mr. Devlin testified that he had had daily opportunity for thirteen years of becoming familiar with Judge Holt's handwriting, and that the signature to the instrument was undoubtedly in testator's handwriting.

Miss Throckmorton testified that she had corresponded with him, and was familiar with his handwriting and knew his signature, and that both the will and the signature were in the handwriting of Joseph Holt.

Other witnesses were called, who testified that they were acquainted with the handwriting of Judge Holt, and that in their opinion the body of the paper and the signature were in his handwriting; after which the proponents rested.

Counsel for the contestants then offered in evidence the deposition of John Judson Barclay, in which the deponent testified that he knew the testator intimately from 1857 to 1866, and at intervals thereafter until the time of his death, and that he had last seen him in November, 1893, when he was in impaired health and in a darkened room, at which last stated time he had a conversation with Judge Holt in regard to the disposition by him

of his property and estate. Evidence in regard to this conversation was duly and fully objected to, and the objection overruled and an exception taken by the proponents. The witness then stated the conversation as follows:

"In our conversation he referred most touchingly to my deceased sister, Mrs. Sarah Barclay Johnson, and made many kind inquiries in regard to my aged mother, who had also been his warm personal friend for many years. In this connection he remarked, 'I have made my will and have made provision for her to receive some pictures,' &c., which my sister had painted for him, as well as an ambrotype or photograph of herself, which he highly prized and wished my mother to possess."

Another witness, Mrs. Briggs, testified under proper objection and exception that she had had a conversation with Judge Holt relating to wills some time between 1888 and 1891, in which he told the witness that if she were going to make a disposition of any piece of her property to do it before she passed away; then she would be sure that it would be done and be permanent; but, he continued, "in my own case my nephew, my brother's son, will attend to my affairs, and I know it will be done all right." Before the conversation ended Judge Holt had stated that it was his nephew, Washington Holt, and that he would attend to his affairs, and he knew it would be all right.

The objection to this testimony was on the ground that, if it tended to prove anything, it could only mean that there was a will existing in which Washington Holt was named as executor, and that if offered for the purpose of proving the contents of such will its execution could not be proved by mere declarations of the testator, and also that the legal presumption was that as the will was not produced or found that it had been revoked. If not revoked it must be produced, and that parol declarations of this character are inadmissible as a basis for proving revocation. Counsel for the contestants admitted that their claim was that there was a will existing in which Washington Holt was executor, but at the same time counsel stated that they wished it understood that the evidence was also offered both on the question of forgery and on the question of revocation of the alleged will of 1873. The objections were overruled and the testimony admitted and exceptions duly taken.

Subject to the same objections and exceptions, counsel for the contestants further gave evidence to the jury tending to prove that between the years 1884 and 1893 Judge Holt, on several occasions, told Washington D. Holt that he had made him (Washington Holt) his executor, and on several occasions Judge Holt informed Mary Holt and her mother Vanda Holt that they would be much better off after his death; that they would then go to Europe, and Mary must become proficient in French so that while in Europe she could act as their interpreter. Evidence was also given that during the same period Judge Holt told the servants of his

house on two occasions that Washington D. Holt would have charge of his affairs after his death.

It was also proved that Judge Holt was born in or about the year 1807, in the State of Kentucky, and that until 1856 he lived there, excepting a few years when he practiced law in Mississippi; that he died in the city of Washington in August, 1894, leaving an estate of about $180,000, about $40,000 of which consisted of real estate in the city of Washington; his mother died in 1871, previous to the date of the alleged will, February 7, 1873.

During the war it would appear that there was some bitterness of feeling engendered in Judge Holt's mind by the part taken by his relatives, most of whom favored the South, and some of whom entered its military service. Evidence was also given on the part of contestants tending to prove that Judge Holt, prior to February 7, 1873, had on several occasions received visits at his house in Washington from some of his nieces and nephews and had kindly received them and spoken kindly of them to others after they had gone.

Letters of his were received in evidence, without objection, dated prior to February 7, 1873, directed to different relatives in Kentucky, and tending to show pleasant relations between them, while letters of a similar nature from him to those relatives, dated subsequently to February 7, 1873, and up to within a few years prior to his death in 1894, were admitted, but under an objection and exception as to their competency. Evidence was also given, subject to similar objections and exceptions, of declarations of an unfriendly character on the part of Judge Holt towards the father of Miss Throckmorton, and also towards her grandmother, the evidence tending to show that he had said some time after the date of February, 1873, that the Throckmortons were his enemies, and that at a reception given by President Arthur, Judge Holt had refused to shake hands with Major Throckmorton, the father of Miss Josephine; also declarations of his to his servants that he would not see the Throckmortons, these declarations having been made many years subsequently to February, 1873.

All of this class of evidence was offered by the contestants in support of their allegation that the paper was a forgery as well as upon the issue of revocation.

There was also evidence given on the part of the proponents tending to show that Miss Throckmorton was a great favorite of Judge Holt's, and that his feelings of affection for her had never changed, notwithstanding he may have felt differently towards her father and grandmother. She was his goddaughter, and she testified (after the evidence above referred to on the part of contestants) that she frequently visited and stayed at Judge Holt's house, and in 1892 he told her that he was an old man, on the brink of his grave, but that he had provided for her, and that she would be per-

fectly independent, and that was the last time she ever saw him; that he never spoke to her at any time otherwise than kindly and with affection.

Letters indicative of interest and affection for the mother of Miss Throckmorton were put in evidence by proponents, after evidence of that character had been given by contestants, in relation to the relatives of Judge Holt.

Other evidence was given upon the trial not necessary now to be referred to.

To the question whether the paper filed in court on August 26, 1895, was executed by Joseph Holt as his last will and testament, the jury answered "No."

To the fourth question, whether, if the paper had been executed by Joseph Holt as his last will and testament, the same had been revoked by him, the jury answered "No; because it was not executed."

No evidence having been given in relation to matters referred to in the second and third questions, the jury by direction of the court returned a negative answer.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

Before proceeding to a discussion of the more important questions involved in this case we will refer to two decisions of the trial court upon questions of evidence, in which we think there was error.

The witness, P. Tecumseh Sherman, had been called by the proponents of the will for the purpose of proving the signature of his mother, Mrs. Ellen B. E. Sherman, and had stated that in his opinion the signature on the paper was genuine. He did not testify as to the genuineness of the signature of his father, as Senator John Sherman, the brother of the General, had testified that in his opinion the signature was genuine. Subsequently, when the case was with them, the contestants called as a witness John B. Randolph, who, after testifying that he had been employed for more than thirty years in the office of the Secretary of War, and that he was so employed while General Sherman had acted as Secretary and also when he had been General of the Army, testified that he was familiar with the signature of General Sherman, and had recently re-examined the signature on the paper in question, and that in his opinion the signature was not that of General Sherman. Upon cross-examination he was asked his reason for that opinion, and among others stated that in the genuine signature of General Sherman in the long quirl on the capital T the upper and lower lines meet; that he never saw one in which they did not meet, and he had seen thousands of them. In response to a further question on cross-examination he said that the upper and lower lines met at least in four out of five signatures. He also stated that another reason for his

belief that the signature was not that of the General's was that the S in Sherman differed from the genuine S in the little stroke at the lower part of that letter where the upward stroke crosses the staff; that it should not make so much of a loop or so pronounced a loop as in the paper.

The proponents in rebuttal called as a witness P. Tecumseh Sherman, who had already been sworn in relation to the handwriting of his mother, and by him they offered to prove that this failure of the lines to meet in the letter T was by no means an unusual feature in the signature of his father, General Sherman, and that it was frequently, if not habitually, found therein, and also that the loops at the bottom of the S, as large as that in the signature to the paper, were also usually found. The court excluded this evidence on the objection of contestants that it was not competent as rebuttal.

We think this evidence was competent in that character, and should have been received. The case in regard to the genuineness of the paper was very closely contested, and was one of the vital points in the trial. Evidence had been given on both sides and witnesses of the highest character and respectability had differed in regard to the genuineness of the signatures. Although the court, when the case was first with the proponents, had notified counsel that they must offer all the evidence they proposed to offer upon the subject before they first rested their case, and in accordance with such decision they had proceeded to give further evidence, we are not able to see how that fact is material at this point. Counsel for the proponents could not anticipate what evidence would be given by their opponents, nor what reasons might be offered by a witness as the ground for an opinion against the genuineness of any signature on the paper. When Mr. Randolph therefore was examined, and stated his opinion that the signature on the paper was not that of General Sherman, he was naturally asked on cross-examination if there were any particular reason why he had come to that conclusion, and in giving that reason he stated the failure of the lines to meet in the letter T, and the peculiarity of the loop in the letter S. The proponents could surely not be expected to anticipate that the letter T or the letter S would be the particular subject of criticism by any witness on the other side, nor what the character of the criticism might be. There was nothing to call their attention to the question, and in the nature of things it is plain the alleged peculiarities suggested by Mr. Randolph could not have been anticipated before they were spoken of by the witness. Under these circumstances it seems to us it was proper evidence in rebuttal, and that it was most important and material to show by a perfectly competent and absolutely disinterested witness, the son of General Sherman himself, that the peculiarities testified to by Mr. Randolph were in fact no peculiarities, and were frequently if not habitually present in the genuine signature. The fact that after the witness

Randolph had testified that he never saw one signature of General Sherman's in which the lines in the capital T did not meet, he subsequently stated that they met certainly as often as four out of five times, did not render the proposed evidence of Mr. Sherman immaterial when it was offered to be shown by him that these lines not only frequently but habitually met. It is possible to imagine that the signatures of General Sherman which Mr. Randolph had examined in the War Department would bear out his statement that the meeting of these lines occurred at least as often as in four out of five of the signatures, while in those examined by the son of the General, and with which he was familiar, a failure to meet might be frequent, if not habitual, and thus there might be no contradiction between the two witnesses; but such a case would be highly improbable to say the least, and we think that if Mr. Sherman had been permitted to testify upon the subject, and had in fact testified in accordance with the offer, such testimony would have been most material as affecting the reasons given by Mr. Randolph for his belief that the signature was not that of General Sherman. This might be true without impeaching in any degree the integrity of Mr. Randolph or his intention to testify what he believed to be the truth. As neither witness saw the signature made, it was a matter of opinion with each, and while either might have been mistaken, such mistake would not necessarily affect the character of the witness. It was not a case where the discretion of the judge was appealed to. It was a case of strict right, and we are of opinion that the court below erred in refusing to admit the evidence. In such a case as this, where there was no evidence by an eyewitness as to the signatures of the parties, it became of the greatest importance that no admissible evidence should be excluded when offered upon the question of their genuineness. For this error we think a new trial will have to be granted.

Again, in the course of the trial the contestants called a Mrs. Briggs as a witness, and proved by her that she was a journalist by profession and had made literature her business in life, and that she had received instruction from Judge Holt in the line of composition in the English language; that she had gone to him and asked his advice about a series of articles written by her, because she had been informed that he was a master of the English language; that he was her master and teacher in such matters. She was also somewhat familiar with his handwriting, and stated that in her opinion the signature "J. Holt" to the paper in question was not the signature of Judge Holt. She was then asked: "Have you formed that opinion in any respect upon any matter except the mere handwriting?" This was objected to and admitted under an exception. The witness answered that she had, that it was from the composition: "More the composition, as well as the writing."

Other witnesses were called who were permitted to prove that they formed their opinions in regard to the paper from its composition and style, and their knowledge of Judge Holt's legal and literary attainments, as well as from their familiarity with his handwriting. One witness was asked this question: "Let me call your attention to the use of the word 'inherit' in that paper, in the middle paragraph. From your knowledge of General Holt's characteristics and his way of expressing himself, what do you think as to that being his expression?" This question was duly objected to and the grounds fully stated, but the court overruled the objection and permitted the witness to answer, which he did by saying that he did not think the testator would use that expression.

The counsel for the contestants say that these rulings were right, but that if there were any error, it was cured by the subsequent charge of the court to the jury, given upon the request of counsel for the contestants, in which the jury were instructed "to disregard any opinion as to whether Joseph Holt wrote the paper in controversy that may have been expressed by any of the witnesses for the caveators in this case so far as such opinion was based upon anything but the handwriting of the paper. In so far as any such opinion may have been based in whole or in part upon the composition of the paper or the expressions contained in it, or the legal or literary attainments of said Joseph Holt, they are withdrawn from the consideration of the jury. But all other evidence which has been admitted in this case bearing upon the legal attainments and literary style of said Joseph Holt remains as competent evidence for the consideration of the jury, along with the other evidence in the case bearing upon the question of the genuineness of said paper."

The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. (*Pennsylvania Coal Company* v. *Roy*, 102 U. S. 452; *Hopt* v. *Utah*, 120 Id. 430, 438.) But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt* v. *Utah* (*supra.*) And see *Waldron* v. *Waldron*, (156 U. S. 361, 383.)

There may also be a defect in the language of the attempted withdrawal, whether it was sufficiently definite to clearly identify the portion to be withdrawn. This evidence was regarded upon the trial as of considerable importance. The question of its admissibility was raised in the early stages of the trial, and the evidence was excluded. It was again raised while the case was with the contestants and the evidence admitted at their

instance, and several witnesses sworn in regard to it. After that an effort was made on the part of the proponents to give testimony in their favor on this question, and it was refused as not rebutting in its character. It is not a case therefore of the introduction of merely irrelevant evidence, such as was stated in *Pennsylvania Coal Company* v. *Roy*, (*supra*;) nor like the case of *Hopt* v. *Utah*, (*supra*,) where the testimony of a single witness, a physician, as to the direction from which the blow was delivered, had been admitted, and where it was held that if it had been erroneously admitted, its subsequent withdrawal from the case with the accompanying instructions cured the error. That was a plain question of evidence on a single point, and on the part of one witness only.

Here was a case where several witnesses gave opinions in regard to the handwriting in the disputed paper, based upon their knowledge of the handwriting of Judge Holt, and also based upon their familiarity with his legal attainments and with his characteristics of style and composition, while others based their opinions upon handwriting only. Which were the witnesses that based their opinions partly upon both foundations, the jury could not be expected to accurately recall after a long trial lasting several weeks. Nevertheless it was called upon to separate and cast aside that portion of the evidence which had been based upon such facts, and after excluding that evidence, determine as to the value of the remaining opinions based upon knowledge of handwriting only. It is at least questionable whether the case does not come within the exception to the rule by reason of the possible impression produced upon the jury during the long trial, in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility.

The witnesses who testified upon both knowledge of handwriting and familiarity with the style and legal attainments of Judge Holt may have made the deeper impression upon the jury, and they may have failed to realize that it was those particular witnesses whose evidence on the subject was to be withdrawn. And while the opinions of these witnesses as to the handwriting of the deceased were withdrawn, yet their evidence as to the legal attainments and composition and style of Judge Holt was to remain as competent evidence in the case. All this was called for by the directions, and without naming a single witness or recalling to the jury the fact that it was his particular opinion regarding the handwriting which was withdrawn. This was a somewhat difficult task for any mind, and there was no certainty under such general directions that it was properly understood, or that with the best intentions it was fully performed. In such a case as this and under the particular facts herein we think the names of the witnesses should have been given and the specific evidence which was given by them and which was to be withdrawn should have been pointed out.

The court, be it remembered, was not responsible for the character of the directions. It simply gave them as asked for by the contestants and in the language prepared by their counsel, and whatever they lacked in the way of precision and certainty is not the fault of the court.

It would appear that the counsel felt the doubt as to the admissibility of the evidence, and after striving so hard to get it in, when they desired it to be withdrawn they were under an obligation to have it done plainly and certainly. Upon the particular facts of this case, while not impairing the force of the general rule, we are of opinion that the withdrawal was far too uncertain to be of any avail.

We are thus brought to a consideration of the merits of the question decided by the court below. Is the opinion of a witness as to the genuineness of the handwriting found in the paper, based in part upon the knowledge of the witness, of the character and style of composition and the legal and literary attainments of the individual whose handwriting it purports to be, competent to go to the jury upon that question? If he is able to give an opinion without such evidence, and from his familiarity alone with the handwriting, can the attempt be permitted to corroborate or strengthen such an opinion by this kind of evidence? We think not. An expert in regard to handwriting is one who has become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter and does not in itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye. But the process of his mind and the language or style in which in the opinion of a witness the person habitually clothes his thoughts, are not matter of expert evidence, proper to be presented to a jury, for the purpose of determining whether the paper presented is or is not in the handwriting of the particular individual, in regard to whom the inquiry is made. The fact may of course be proved that the person was a man of intelligence, education, high legal attainments, refinement, and not addicted to coarseness in speech or writing, and the inference may be sought to be drawn from the facts that the paper in question is or is not his composition and is or is not his handwriting; but where it is material the inference is for the jury, and taking the opinion of the witness in that regard is to take his opinion upon the very subject to be decided by the jury, and is not at all a proper case for opinion evidence.

We think the court, therefore, erred in permitting witnesses to give an opinion as to the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style and composition of the individual whose handwriting was in controversy, and as corroborative of their opinion from knowledge of handwriting alone.

The two points above indicated in which we think the trial court fell into error require the reversal of this judgment, and the granting of a new trial, but there are other questions in the case which are fully presented by the record, and which have been most ably and exhaustively argued by counsel on both sides. These questions will necessarily arise at the very threshold of the case when it comes on for trial again, and we think it is our duty to express our views in relation to them. They relate to certain evidence upon the issues of forgery and revocation.

And first, as to forgery. The paper in question was propounded as the will of Joseph Holt.

The facts set forth in the statement prefixed to this opinion show the case to be one of an extraordinary nature. There being no proof in regard to the history or whereabouts of the paper before it was received by the register of wills, and the evidence *pro* and *con* as to its genuineness having been received upon the trial, the question arises as to the admissibility of the various declarations of the deceased, and also of his letters to different relatives living in Kentucky and other States, which it is claimed tend to show the improbability of the deceased making such a disposition of his property as is made in the paper in controversy. (They are referred to in the statement of facts above given.) The question is, in other words, can the contestants prove by unsworn oral declarations and by letters of the deceased facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a forgery? The decisions of the State courts as to the admissibility of this kind of evidence are not in accord. Many of them are cited in the margin.* Those included in class A favor the exclusion of such evidence, while those in class B favor its admission. The principle of exclusion was favored by Chancellor Kent, and also by Justices Washington, Story, Livingston and Thompson, all of whom once occupied seats upon the bench of this court.

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* Class A. *Boylan* ads. *Meeker*, (28 N. J. Law, 274;) *Rusling* v. *Rusling*, (36 N. J. Eq. 603;) *Gordon's Case*, (50 N. J. Eq. 397, 424;) *Hayes* v. *West*, (37 Ind. 21;) *Kennedy* v. *Upshaw*, (64 Texas, 411;) *Mooney* v. *Olsen*, (22 Kan. 69;) *Thompson* v. *Updegraff*, (3 W. Va. 629;) *Couch* v. *Eastham*, (27 W. Va. 796;) *Dinges* v. *Branson*, (14 W. Va. 100;) *Gibson* v. *Gibson*, (24 Mo. 227;) *Cawthorn* v. *Haynes*, (Id 236;) *Walton* v. *Kendrick*, (122 Mo. 504;) *Comstock* v. *Hadlyme*, (8 Conn. 254, 263;) *Shailer* v. *Bumstead*, (99 Mass. 112;) *Lane* v. *Moore*, (151 Mass. 87;) *Robinson* v. *Hutchinson*, (27 Vt. 38,) where the evidence was received, but the inquiry was as to mental capacity, the testatrix being greatly broken and enfeebled in mind and capacity and of advanced age; *Jackson* v. *Kniffen*, (2 Johns. 31;) *Jackson* v. *Betts*, (6 Cow. 377;) *Waterman* v. *Whitney*, (11 N. Y. [1 Kernan] 157, citing many cases;) *Johnson* v. *Hicks*, (1 Lansing, [N. Y.] 150;) *Marx* v. *McGlynn*, (88 N. Y. 357;) *Leslie* v. *McMurtry*, (60 Ark. 301;) *Stevens* v. *Vanclève*, (4 Wash. C. C. 262;) *Procis*

The cases cited in the two classes do not all, or even a majority of them, deal with the question of forgery, but many of them treat the subject of declarations of a deceased person upon a principle which would admit or exclude them in a case where forgery was the issue. It is not possible to comment upon each of the cases cited in these lists, without unduly extending this opinion. We can only refer to the two classes generally, and state what we think are the questions decided by them.

In the cases contained in class A, it is held that declarations, either oral or written, made by a testator, either before or after the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestæ*, are not admissible as evidence in favor of or against the validity of the will. The exception to the rule as admitted by these cases is that where the issue involves the testamentary capacity of the testator and also when questions of undue influence over a weakened mind are the subject of inquiry, declarations of the testator made before or after, and yet so near to the time of the execution of the will as to permit of the inference that the same state of mind existed when the will was made, are admissible for the purpose of supporting or disproving the mental capacity of the testator to make a will at the time of the execution of the instrument propounded as such. These declarations are to be admitted, not in any manner as proof of the truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or, in other words, the mental capacity, of the testator at the time when the instrument in question was executed.

The cases contained in class B favor generally the admission of declarations of the deceased, made under similar conditions in which declarations are excluded by the cases in class A.

If declarations of the character now under consideration are admissible when made prior to the execution of the alleged will, although not after it, then a large part of the evidence in this case as to the oral and

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v. *Reed*, (5 Bing. 435;) 1 Redfield on Wills (4th ed.) pp. 556, 557; Gillett on Ev. sec. 281; Schouler on Wills, 3d ed. sec. 317*a*.

Class B. *Turner* v. *Hand*, (3 Wall Jr. 88, 92, 107;) *Warren* v. *Brown*, (51 Tex. 65;) *Swope* v. *Donnelly*, (190 Pa. St. 417;) *Taylor Will Case*, (decided by Surrogate of New York County, 10 Abb. Pr. N. S. 300, 306. This case was reversed *sub. nom. Howland* v. *Taylor*, in the Court of Appeals on a question of fact, but no opinion is reported: 53 N. Y. 627;) *Davis* v. *Elliott*, (55 N. J. Eq. 473; claimed by respondents to be adverse to *Boylan* ads. *Mecker*, which is not referred to, neither is the question itself discussed, although evidence of this nature seems to have been received, without objection;) *Hoppe* v. *Byers*, (60 Md. 381;) *Burge* v. *Hamilton*, (72 Ga. 568, 624;) *Sugden* v. *Lord St. Leonards*, (L. R. 1 P. D. 154;) *Collagan* v. *Harrison*, (57 Me. 449, by an equally divided court;) 1 Phillim. Rep. 447–460.

written declarations of the deceased was properly admitted upon the issue of forgery, because such declarations may have all been made before the forgery was executed, the date of the paper not furnishing any evidence of the time when it was in fact prepared. The forger could not be permitted, by giving a date to the instrument, to fix the time subsequent to which the declarations should be excluded.

But we see no good ground for the distinction. The reasons for excluding them after the date of the will are just as potent when they were made prior thereto. When made prior to the will, it is said they indicate an intention as to a testamentary disposition of property thereafter to be made, and that such declarations may be corroborative of the other testimony as to what is contained in the will, as is said by Mellish, L. J. in *Sugden* v. *Lord St. Leonards*, (L. R. 1 P. D. 154, 251,) (a case of a lost will,) or else they indicate the feeling of the deceased towards his relatives, from which an inference is sought that a testamentary provision not in accordance with such declarations would be forged. The declarations are, however, unsworn in either case, and if they are inadmissible on that ground when made subsequent to the execution of the will, they would be also inadmissible when made prior to its execution. In *Stevens* v. *Vanclève*, (4 Washington C. C. 262, 265, *supra*,) Mr. Justice Washington said that declarations of the deceased, prior or subsequent to the execution of the will, were nothing more than hearsay, and there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity. Judge Pennington concurred in those views.

After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not a part of the *res gestæ*, declarations of this nature are excluded because they are unsworn, being hearsay only, and where

they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue, (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity,) but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

Thus it is said in *Shailer* v. *Bumstead*, (99 Mass.) which is one of the cases cited in the margin in class A: "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. *The truth or falsity of the statement is of no consequence.*" The testatrix in the above case died in 1865, at the age of ninety-one, having executed a will in 1851, another in 1853, and a codicil thereto in 1857, and among other issues raised was one of testamentary capacity. The declarations that were held admissible were only for the purpose of showing "what manner of person she was," who uttered them. They were used to throw light upon an alleged state of mind which was involuntary and the result of disease and old age. If used for any other purpose they were

not admissible, said the court, because they were mere hearsay and could never be explained or contradicted by the person who uttered them.

And so in *Gibson* v. *Gibson*, (24 Mo. 227,) the court said such declarations were admitted when it was proposed to show the condition of the testator's mind or to show the state of his affections, but never as a mere narrative of facts. The latter remark is explained in the next case in the same volume, (p. 236,) the opinion in which was delivered by the same judge, by which it is seen that such evidence was admissible only on the issue of insanity. See pages 238 and 239, where the point is plainly made that there must be a foundation of that kind in order to let in the proof of declarations as to his affections, which could only be admitted on such an issue.

And it was also said in *Waterman* v. *Whitney*, (11 N. Y. *supra*,) that to receive declarations when no such issue was involved would be attended "with all the dangers which could grow out of a change of purpose, or of external motives operating upon an intelligent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator." To the same effect is *Boylan* ads. *Meeker*, (28 N. J. L.,) cited in class A. It is therefore clear that as their truth in such an issue is not of importance, and their materiality lies only in the fact that they were made, the principle of rejecting unsworn declarations has no application. But when it is sought to prove them as coming from one about whose perfect mental capacity there is no dispute, although they relate to the alleged state of his affections when made, the only possible importance of such declarations rests in the claim that they are true, and an inference is sought to be drawn which is founded wholly upon the assumption of their truth. Now if their only value rest upon that assumption, then the fact that they are unsworn declarations brings them at once within the bar of the general rule of evidence that unsworn declarations are not admissible. As indicative of mental capacity they are original evidence, sworn to by the witness, but as evidence of the truth of the statement declared they are simply unsworn declarations, and should be excluded accordingly.

The cases mentioned in class B proceed upon a totally different theory, viz., that the declarations may be true and are made by a person who knows all about the subject, and they are therefore proper to be submitted to the jury for what that body may regard their worth, although it is admitted that it is a very dangerous kind of evidence. We are familiar with the case of *Sugden* v. *Lord St. Leonards*, (*supra*, L. R. 1 P. D. 154.) Cockburn, Chief Justice, in that case favored the admission of declarations of the testator as secondary evidence of the contents of the lost will, on the ground that such declarations were usually honestly made,

and that the evidence might be put on the same footing with declarations of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case. (pp. 224, 225.) It seems to us that the admission of the evidence substantially enlarged the exception to the rule as to hearsay. Jessel, M. R., (at p. 240,) undertook to give the exceptions to the general rule as to hearsay, (which exceptions do not include this case,) but he thought upon the principles upon which some of the exceptions were founded, the declarations had been properly admitted, the case being one of a lost will, known to have existed but which at the death of the testator was not forthcoming. Mellish, L. J., thought the declarations of testator made after the will were inadmissible, while James, L. J., and Baggallay, J. A., concurred with the Chief Justice.

The remarks of the Master of the Rolls were adverted to in the subsequent case of *Woodward* v. *Goulstone*, in the House of Lords, (L. R. 11 App. C. 469,) by Herschell, L. C., and by Lords Blackburn and Fitzgerald, all of whom stated (pp. 478, 484, 486) that they did not wish in deciding the case to be regarded as approving the views in the *Sugden* case upon the admissibility of the declarations of the deceased testator made subsequently to the execution of the will, even in the case of a lost will; that the question was not necessary to the decision of the case then before them, and that they wished to reserve their opinion until it was necessary to decide it. Considerable doubt is thus thrown by the highest legal tribunal in England upon the correctness of the decision of the lower court. In New York and probably in most of the other States the character and sufficiency of the evidence to establish a lost will are provided for by statute. (*Schultz* v. *Schultz*, 35 N. Y. 653.)

The decision in the *Sugden* case also overrules that of *Quick* v. *Quick*, (3 Sw. & Tr. 442,) where Lord Penzance refused probate of the alleged will, there being no other evidence of its contents than the declarations of the testator made after its execution, and it also runs counter to the opinion of Lord Campbell in *Doe* v. *Palmer*, (16 Q. B. 747.)

The law cannot therefore be regarded as settled in England that, even in the case of a lost will, declarations of the testator made after its execution are to be admitted as evidence of its contents. It is also proper to call attention to the fact that all the judges participating in the decision of *Sugden's* case were entirely satisfied with the proof of the contents of the lost will, wholly aside from evidence of these declarations.

While the case is not like the one before us, inasmuch as the inquiry here is not in regard to the contents of a lost will, yet it might perhaps be urged with some force that if declarations of that kind were admissible, the evidence now before us is competent, and was properly admitted.

We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evidence. Where the issue is not one in regard to the mental capacity of the alleged testator to make a will, his declarations upon the subject cannot be said to be declarations made against interest, such as declarations made by an individual while in possession of property, in disparagement of his absolute ownership. Such evidence has been admitted as declarations against interest or as characterizing possession, but the same declarations made after a conveyance of the land would be inadmissible, as mere hearsay and in no degree as declarations against interest. Declarations made by an alleged testator before or after the date of the paper are not declarations against interest, because they can have no effect upon his interest. The will would not take effect until after his death, and before that time he could revoke it or make another, and it would still be immaterial evidence even if he did neither.

There is another reason why no exception should be made in favor of such evidence upon which to build a presumption or inference of forgery, and that is the inherent weakness and danger of the evidence itself. No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator's mind towards relatives or others, as evidenced by his declarations. It is every day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and that too in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will. Although admitting the evidence, yet Sir John Nicholl, in *Johnston* v. *Johnston*, (1 Phillim. Rep. 447, 460,) said: "Parol declarations ought to be received with great caution; in general, they are the lowest species of evidence. . . . They may on the part of the testator be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended and misrepresented. But confidential communications with his wife upon her serious representations to him respecting so important a subject are deserving of rather more weight as evidence of the deceased's mind and intentions."

The common law rules of evidence do not obtain in the ecclesiastical courts of England in regard to the proof of wills relating to personalty.

"On the contrary, the evidence bearing on these points is generally mixed up with declarations of the party, and frequently consist of such declarations alone." (Per Tindal, Ch. J., in Exchequer Chamber, 1838, in *Marston* v. *Fox*, 8 Ad. & El. 14, 56.) The unreliable character of the evidence is acknowledged, but it is taken in connection with almost any other evidence, for what it is worth. In our judgment its value is entirely too problematical at its best to cause us to make an exception to the well considered rule of evidence prohibiting hearsay.

The motives underlying and causing the particular provisions of a will may be so various and so hidden from observation that it is in the highest degree unsafe to draw an inference of forgery based upon declarations as to testamentary intentions which are so subject to change and which declarations may or may not represent the true feelings of the testator or even his actual testamentary intention at the time when spoken. The result is very apt to be a breaking down of the safeguards provided by statute for the proof of the due execution of a will, and to provide in place of that proof evidence which is in itself of the most unsatisfactory nature, and from such evidence permit a jury to draw a still more uncertain inference of forgery.

We are not aware of any well founded rule permitting such evidence on the mere ground that it is probable the declarations were true, and therefore, though unsworn, should be received. On this ground it might equally be maintained that evidence of the declarations of a person, since deceased, in a matter regarding which he had been familiar, who had been a man of undoubted character and probity, and who had had no interest in the subject, ought to be received though not sworn to. But in such case the probability of their truth has not been regarded as sufficient to admit the declarations.

In matters of pedigree, declarations by members of the family are admitted, because the question in such cases is generally one concerning the parentage or descent of the individual, and in order to ascertain that fact it is material to know how he was acknowledged and treated by those who were interested in him or sustained towards him any relations of blood or affinity. (1 Greenleaf's Ev. secs. 103, 104.) Evidence showing how he was acknowledged and treated is frequently only to be shown by declarations made at the time, and though unsworn are received as the best that the nature of the case permits. The analogy between such evidence and evidence of the nature under discussion is somewhat formal and far-fetched.

Undoubtedly cases may arise from the enforcement of this rule where injustice may be the result. It is possible that a forged instrument may in a particular case be declared a true one, where if evidence of this nature had been admitted the decision might have been the other way. An extreme case may be assumed, such as was put by Mr. Justice Grier in *Turner*

v. *Hand*, (3 Wall. Jr. 88, 107, *supra*,) by way of illustration in charging the jury, and although he held in the case he was trying that the evidence was admissible, he at the same time said it must be regarded with very great caution as a dangerous kind of evidence. *Turner* v. *Hand* was one of the many phases in which the controversy over the alleged will of Meeker was conducted in the courts of New Jersey and in the Federal court, while *Boylan* ads. *Meeker*, (28 N. J. Law,) above cited, was another.

The difficulty in regard to a rule of evidence is that it cannot be the subject of enforcement or non-enforcement according to the exigencies of the particular case. The rule must be general in its application. It cannot depend upon the opinion of the judge in each case whether the declarations are or are not to be relied upon. The rule must either permit or refuse to permit the evidence. We think that more injustice is possible as a result of admitting the evidence than from its exclusion. The statutes of all the States have very careful and stringent provisions in relation to the making of wills, and the due proof of their execution. The wills must be in writing, (with the exception of certain nuncupative wills,) signed by the testator and witnessed by others; and to permit evidence of the nature given in this case tends, as we think, most strongly to break down the efficiency of the statutory provisions, and to render proof of the execution of wills much less certain than was contemplated by the statutes. If declarations of the deceased were admissible to attack, they would then of course be admissible to sustain the will, and there would be apt to arise a contest in regard to the number and character of conflicting declarations of the deceased which he could neither deny nor explain, and in the course of which contest great opportunities for fraud and perjury would exist. The statutes as to wills were passed, as we believe, for the very purpose of shutting out all contests of such a character.

If not admissible generally, it is as we think inadmissible even as merely corroborative of the evidence denying the genuine character of the handwriting. It is open to the same objection in either case as merely unsworn declarations or hearsay.

We are therefore of opinion that the court below erred in admitting this evidence upon the issue of forgery, and that the error was of a most important and material nature.

The last question is whether this evidence, even though not admissible on the issue of forgery, was admissible upon that of revocation, as it was offered on both, and if admissible upon either, the general objection to its admission would be unavailing, and there was no request to charge the jury to confine it to the issue of revocation alone. This question remains therefore, although the jury found there was no revocation because the will was never executed.

It is manifest that upon the issue of revocation the fact of the execution of the will is to be assumed, for in the nature of things one cannot revoke a will which he never made. It is conceded on the part of proponents that the will appeared, when it came to the hands of the register of wills, to have been mutilated, torn and burned around its edges, and counsel concede that its appearance is such that if it had been found among the papers or repositories of the deceased, a presumption would have arisen in favor of its revocation. The question is whether any presumption of cancellation or revocation by the deceased, or under his direction, is created in this case by the condition in which the paper was when received by the register of wills through the mail on August 26, 1895. If not, then these declarations subsequent to 1873 are not admissible on the theory that they are in aid or corroborative of a presumption that does not exist.

After proof that a will had been duly executed and was in the possession of the testator, the failure to find it after his death would be presumptive evidence that the testator had destroyed with an intention to revoke it. The presumption could, of course, be overcome by proper evidence leading to a contrary conclusion. This is conceded.

But here the will is found, not among the papers of the deceased at his former residence, but it comes through the mail to the register of wills more than a year after the decease of Judge Holt. The presumption of revocation cannot therefore attach from the failure to find a will once shown to have existed, for here the will is found and produced. We are left absolutely without evidence as to its whereabouts from the time of its execution in 1873 down to the time when the register of wills received the envelope enclosing it in August, 1895.

It is in evidence that immediately after the death of Judge Holt two of his nephews came to the house, and during the next few days papers were burned under their direction by one of the servants in the house. The evidence of these nephews given on the trial was absolute and distinct to the point that no paper of any consequence or in the nature of a testamentary disposition of property was found or destroyed, and there is no one to contradict or dispute such evidence; but the fact exists that there was a burning of papers.

Some evidence was given upon the subject of a similarity of form between the half printed and half written characters on the envelope directed to the register of wills and those found upon a sign put upon the stable of the deceased by the servant who had destroyed papers under the direction of the nephews, but we think such evidence was of no importance, and it must therefore be admitted that there is no evidence that the address on the envelope was in the handwriting of any particular person.

We think no presumption of revocation by the testator, or under his direction, arises from the appearance of this will when first received by the register of wills.

In *Hitchings* v. *Wood and others*, decided by the Judicial Committee of the Privy Council in 1841, (2 Moore's P. C. C. 355, 447,) Lord Lyndhurst, Langdale, M. R., Shadwell, V. C., Baron Parke and Mr. Justice Littledale being in the court, the holograph instrument purporting to be a codicil to the will of James Wood, sent anonymously by the post to one of the legatees named therein, though partly burned and torn, was (reversing the court below) admitted to probate, the handwriting being satisfactorily proved; and it was held that under the circumstances of the case the *onus* of proving that the cancellation was the act of the testator, and with what intention it was done, lay on the parties opposing the proof. In the course of his opinion, Lord Lyndhurst said:

"Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the *onus* to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom, and under what circumstances, does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practised, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death, we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be approved."

This case establishes the point that no presumption of revocation arose upon the facts herein by reason of the appearance of the paper, and after execution is proved by evidence of the handwriting the *onus* rests upon the individual claiming that the paper was revoked by the testator, to prove the fact. There must be some evidence of an act by the deceased, or under his direction, which would be sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated and torn or otherwise defaced, and under such circumstances that the fact of revocation might be presumed. It was observed in *Johnston* v. *Johnston*, (1 Phillim. R. 447, 497,) that a will once regularly made, the presumption of law is strong in its favor; the intention to revoke must be plain and without doubt.

There being no presumption of revocation from the appearance of the paper, and the *onus* being on those who assert its revocation, can the

written or oral declarations of the testator, made subsequently to the execution of the will, and tending to show the existence of another will, not otherwise proved, or tending to show the state of his affections for his relatives and an alleged change in his feelings towards the relatives of one of the legatees, though not toward the legatee herself, be admitted for the purpose of asking the jury to infer either that the testator himself mutilated and burned with the intention to revoke the will, or directed the acts of mutilation and burning, in order to accomplish such revocation? Can such evidence take the place of proof of an act on the part of the deceased (or directed by him) sufficient to revoke a will, and from which an intention to revoke might be presumed? Here is simply a case of an inference sought to be drawn that the testator did the act and with the intent to revoke the will, because of his making certain declarations as to a will and also because he had expressed friendly feelings towards some of his relatives, and feelings the reverse of friendly towards the father of one of the legatees.

The will having been executed by the testator, it is said that it must be assumed to have been in his possession or under his control up to the time of his decease, and it is urged that proof of the state of mind of the testator during more than twenty years subsequent to the execution of the will is proper to be considered by the jury, in order that it may from that proof infer that the acts of mutilation were performed by the testator or under his direction, and also that they were performed or directed with the purpose of revocation. A double inference is thus based upon a most insecure and dangerous foundation. The evidence is of the same nature that we have just said was inadmissible upon the issue of forgery; only here the inference sought is a revocation instead of the forgery of the will. We think the declarations are no more admissible for the purpose of inferring a revocation than for the purpose of inferring the forgery of the will.

There is in the first place no evidence that the testator either himself performed or that he authorized the acts of mutilation, and we think no presumption that he did can arise from the fact that the will was not found among his papers. And the appearance of the will when received by the register furnished no such presumption.

Counsel for the contestants have cited a number of cases which they claim show the admissibility of this class of evidence, in addition to those cited in the foregoing discussion, upon the issue of forgery. They are placed in the margin.*

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* *Lawyer* v. *Smith*, (8 Mich. 411, 423;) *Patterson* v. *Hickey*, (32 Ga. 156, 164;) *Harring* v. *Allen*, (25 Mich. 505;) *Burge* v. *Hamilton*, (72 Ga. 568, 625) *Collagan* v. *Burns*, (57 Me. 449;) *Collyer* v. *Collyer*, (110 N. Y. 481, 484;) *McDonald* v. *McDonald*, (142 Ind. 55, 81;) *Miller* v. *Phillips*, (9 R. I. 141, 144;) *In re Valentine's Will*, (93 Wis. 45, 55;) *Pickens* v. *Davis*, (134 Mass. 252;) *Gould* v. *Lakes*, (L. R. 6 P. D. 1, 5.)

The evidence is claimed to be admissible for the purpose of authorizing an inference therefrom that the testator himself mutilated or directed the mutilation of the will for the purpose of thereby revoking it. Declarations made by a testator at the time of mutilation or cancellation, going to show the intent with which the act is done, are of course admissible, being part of the *res gestæ*. But as the production of the will under the circumstances proved in this case created no presumption of revocation, it was necessary to prove that the act of mutilation was performed by the testator or by his direction, and with an intention to revoke, and we think that his declarations, not being part of the *res gestæ*, cannot be permitted for the purpose of asking the jury to infer therefrom that the testator not only performed or directed the act of mutilation but did so with the intent to revoke the instrument. This kind of evidence is of a most dangerous character. It is hearsay, and nothing more.

Some of the cases cited above admitted proof of declarations in aid of the presumption of revocation arising from the finding of the mutilated will among the effects of the deceased. (*Lawyer* v. *Smith*, 8 Mich. 411; *Patterson* v. *Hickey*, 32 Ga. 156.) Another case, (*Burge* v. *Hamilton*, 72 Ga. 568,) admitted declarations of a testator made to his attorney at the time of the execution of a codicil to his will, in relation to the number of pages to his will, then present and exhibited to the attorney, the question arising from some mistake in the numbering of the pages, and the testator declaring to his attorney that the will which was then read over to him was all right and the numbering of the pages a mistake. The court held the paper presented an ambiguity, and a question of the identity of the paper produced with the will as executed. The declarations were in reality part of the *res gestæ*.

In another case the evidence went to prove that two sheets stitched together and found in an envelope were parts of the will. (*Gould* v. *Lakes*, L. R. 6 P. D. 1.) In some of the other cases declarations were admitted on the same theory as stated above in the discussion as to forgery.

There must be an act and an intention in order to revoke. Neither can be inferred from evidence of declarations of a testator apart from the act and with no proof that the testator ever performed an act of a revocatory nature. Unless a part of the *res gestæ* we see no reason for the admission of these declarations any more than upon the issue of forgery.

As is stated by James, Lord Justice, in *Cheese* v. *Lovejoy*, (L. R. 2 P. D. 251,) in speaking of the evidence of revocation:

"It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below, 'all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

We cannot overcome the feeling that to admit evidence of this nature is in the highest degree dangerous, and that its admission would tend very strongly to impair the efficacy of the statutes relating to the proof and revocation of wills.

The judgment of the Court of Appeals of the District of Columbia is reversed and the cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District and to remand the cause to that court with instructions to grant a new trial.

Mr. Justice HARLAN, Mr. Justice WHITE and Mr. Justice MCKENNA agreed with the opinion only upon the first and second grounds discussed, and dissented from the others.

Mr. Justice BROWN concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.